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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

JAMES C.F. WANG, *Chairman, Campaign Spending Commission, State of Hawaii, et al.*,

Petitioners,

v.

IAN LIND,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Hawaii allows private parties to file complaints over campaign spending practices with a commission, which enforces Hawaii's campaign spending law. Section 11-216(d) of that law provides:

> Until a determination of probable cause is made by the commission, all proceedings, including the filing of the complaint, investigation, and hearing shall be confidential unless the person complained of requests an open hearing. In the event the commission determines that probable cause does not exist, the complaint shall be dismissed and the entire record of the proceedings shall be kept confidential at the option of the person complained of.

The Questions Presented by this Petition are:

1. Whether Haw. Rev. Stat. § 11-216(d), as applied to a "charging party" prior to a determination of probable cause, is unconstitutional under the First and Fourteenth Amendments?

2. Whether Haw. Rev. Stat. § 11-216(d) is facially void, and never enforceable, on First Amendment "overbreadth" grounds?

3. Whether the courts below breached rules of comity and restraint in failing to indulge limiting constructions of § 11-216(d), and in refusing to certify questions to the Hawaii Supreme Court, so a limiting view of the law might be had?

PARTIES TO THE PROCEEDING

Petitioners are James C.F. Wang, Chairman of the Campaign Spending Commission, State of Hawaii, and Lissa Andrews, William Gillardy, Philip Li, and Mary Oshiro, members of the Commission, as well as Robert Y. Watada, acting Executive Director of the Campaign Spending Commission. Each of these Petitioners appears in his or her official capacity, and as successors in office to the original Defendants in this action, i.e., Robert Y. Watada, former Chairman, and Linda K. Rosehill, James C.F. Wang, Gary G. Grimmer, former Members, and Jack M.K. Gonzales, former Executive Director, of the Commission. Petitioner Wang, along with Defendants Grimmer, Rosehill, Watada, and Gonzales, were also named in their individual capacities in the District Court, but no damages were ever sought from them. *See Kentucky v. Graham*, 473 U.S. 159 (1985). Nonetheless, each of the original defendants, i.e., Mssrs. Grimmer, Watada, Gonzales, and Ms. Rosehill, also appear here in their individual capacities, as does Chairman Wang, in an abundance of caution.

Respondent Ian Lind is a private citizen of the State of Hawaii, and, at the times at issue, was the author, editor, and publisher of the "Hawaii Monitor," an independent non-partisan newsletter devoted to discussing election campaign issues.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 7

REASONS FOR GRANTING THE WRIT 16

I. Review Should Be Granted to Correct the Ninth Circuit's Invalidation, on First Amendment Grounds, of Confidentiality Provisions that Require "Charging Parties" and Other "Participants to the Inquiry" to Await a Determination of Probable Cause Before Disclosing Information Gained Solely As a Result of the Government's Creation of a Forum For Administrative Litigation of Campaign Spending Complaints 18

II. Review Should Be Granted to Correct the Ninth Circuit's Disregard of Settled Principles of Comity and Restraint, Which the Court of Appeals Ignored in Summarily Nullifying Haw. Rev. Stat. § 11-216(d) as Facially and Unconstitutionally Overbroad 22

TABLE OF CONTENTS – Continued

Page

III. Review Should be Granted to Settle the Deep and Continuing Conflicts in the Lower Courts Over the Constitutionality of Confidentiality Provisions that Bar Disclosure of the Course of Administrative Action; the Issue, Which Affects Not only Administration of the Federal Election Campaign Act, but Also the Laws of at Least Ten Other States, is of National Import 24

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES:

Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987) 23

Baugh v. Judicial Inquiry and Review Commission, 907 F.2d 440 (4th Cir. 1990) 14, 15

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) 12

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 17

Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) 8

Burson v. Freeman, 112 S. Ct. 1846 (1992) 22

Butterworth v. Smith, 494 U.S. 624 (1990) 7, 9, 13, 19

Cohen v. Cowles Media Co., 501 U.S. 663 (1991) 7, 13, 19

Cornelius v. NAACP Legal Defense & Educational Fund, 473 U.S. 788 (1985) 20

DeBartolo v. Florida Gulf Coast Trades Council, 485 U.S. 568 (1988) 17

FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985) 10, 17

FDIC v. Mallen, 486 U.S. 230 (1988) 10

First Amendment Coalition v. Judicial Inquiry and Review Board, 784 F.2d 467 (3d Cir. 1986) (*en banc*) 14, 24

Frisby v. Schultz, 487 U.S. 474 (1988) 23

Heckler v. Chaney, 470 U.S. 821 (1985) 11

Hoopii v. Sinclair, 40 Haw. 452 (1954) 12

TABLE OF AUTHORITIES – Continued

Page

Horner v. Criminal Injuries Compensation Comm'n, 54 Haw. 294, 506 P.2d 444 (1985) 12

Johnson Newspaper Corp. v. Melino, 77 N.Y.2d 1, 564 N.E.2d 1046, 563 N.Y.S.2d 380 (1990)..... 25

Kamasinski v. Judicial Review Council, 797 F. Supp. 1083 (D. Conn. 1992) 13, 22, 24

Kentucky v. Graham, 473 U.S. 159 (1985) ii

Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988)..... 23

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)..... 7, 12, 18

Lind v. Grimmer, 859 F. Supp. 1317 (D. Haw. 1993), *aff'd*, 30 F.3d 1115 (9th Cir. 1994) 13

Marshall Construction Co. Ltd. v. Bigelow, 29 Haw. 48 (1926)..... 12

McDonald v. Smith, 472 U.S. 479 (1985)..... 10, 12, 22

McIntyre v. Ohio Elections Comm'n, No. 93-986 (U.S. argued Oct. 12, 1994) 17, 18, 27

New York Times Co. v. United States, 403 U.S. 713 (1971)..... 20

NCAA v. Tarkanian, 488 U.S. 179 (1988)..... 20

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978)..... 10

Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984)..20, 25

Secretary of State v. J.H. Munson Co., 467 U.S. 947 (1984)..... 23

Snepp v. United States, 444 U.S. 507 (1980)..... 19

TABLE OF AUTHORITIES – Continued

Page

Tennessee v. Elliott, 478 U.S. (1986) 12

Turner Broadcasting System v. FCC, 114 S. Ct. 2445 (1994) 16, 20

Virginia v. American Booksellers, Inc., 484 U.S. 383 (1988) 24

Waimea Falls Park, Inc. v. Brown, 6 Haw. App, 83, 712 P.2d 1136 (1985) 20

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 21

STATUTES:

2 U.S.C. § 437g(a)(4)(B)(i) (1992) 7, 9, 26

2 U.S.C. § 437g(a)(12) (1992) 7, 9, 26

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

28 U.S.C. § 1331 2

28 U.S.C. § 1343(a)(3) 2

Ark. Code Ann. § 7-6-218(b)(3) (1990) 26

Haw. Rev. Stat. § 11-216 (1985 & Supp. 1992) 2, 3, 7, 14

Haw. Rev. Stat. § 11-216(d) (1985) ..... *passim*

Haw. Rev. Stat. § 11-228 (1985) 5

Haw. Rev. Stat. § 11-229 (1985) 5

Ill. Comp. Stat. Ann. Ch. 10, § 5/9-21 (1993) 26

Iowa Code Ann. § 56.11.2 (1993) 26

Kan. Stat. Ann. § 25-4161 (Supp. 1992) 26

TABLE OF AUTHORITIES – Continued

Page

La. Stat. Ann. § 1511.8 (Supp. 1993) 26

Mo. Stat. Ann. (Vernon) Tit. IX, Ch. 130, § 130.066 (1992) 26

N.D. Cent. Code Tit. 16.1, § 16.1-09-06 (1992) 26

R.I. Gen. L. Ann. § 17-25-5(a)(7) (1992) 26

S.C. Code Ann. § 8-13-320(c) (1991) 26

Tenn. Code Ann. § 2-11-202(5) (1992) 26

REGULATIONS:

11 C.F.R. § 111.20(a) (1993) 9, 26

11 C.F.R. § 111.21(a) (1993) 9, 26

11 C.F.R. § 111.21(c) (1993) 9, 26

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PETITION FOR WRIT OF CERTIORARI

Petitioners James C.F. Wang, individually and in his official capacity as Chairman of the Campaign Spending Commission, State of Hawaii, *et al.*, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 22, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, entered July 22, 1994, is reported at 30

F.3d 1115 (9th Cir. 1994), and is reprinted in Appendix ("App.") "A," *infra*. The order of the Court of Appeals, filed August 17, 1994, denying Petitioners' petition for rehearing, is unreported and is reprinted in App. "E." The order of the District Court from which appeal was taken is reported at 859 F. Supp. 1317 (D. Haw. 1993), and is printed in App. "B." The final judgment of the District Court is unreported and printed at App. "C."

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit was entered July 22, 1994, *see* Pet. App. 1, and a timely petition for rehearing and suggestion of the appropriateness of rehearing *en banc* was filed on August 5, 1994. The petition for rehearing was denied, and the suggestion for rehearing *en banc* was rejected, on August 17, 1994, *see* Pet. App. "E," and the time in which this Petition may be filed extends to and includes November 15, 1994. This Petition is timely. The jurisdiction of this Court is invoked here under 28 U.S.C. § 1254(1). Jurisdiction in the District Court was alleged to have been conferred by 28 U.S.C. §§ 1331 and 1343(a)(3). Jurisdiction to review the judgment of the District Court lay in the Ninth Circuit under 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

Haw. Rev. Stat. § 11-216 (1985 & Supp. 1992) provides that:

§ 11-216 Complaints, investigation, and notice. (a) Complaints of violations of this subpart against any person shall be filed with the commission. The complaint shall be in writing and shall be signed under oath by the complainant. Complaints initiated by the commission shall be in writing and signed by the commission.

(b) The commission shall give notice of receipt of the complaint together with a copy of the complaint to the person cited and shall afford the person an opportunity to explain or otherwise respond to the complainant. The commission may also cause an investigation to be made of the complaint.

(c) Upon hearing the response of the person cited, if the person elects to respond to the complaint, and upon completion of any investigation, the commission shall make a prompt determination as to whether probable cause exists that a violation has been committed.

(1) Any person who appears before the commission shall have all of the rights, privileges, and responsibilities of a witness appearing before the courts of this State. All witnesses summoned before the commission shall receive reimbursements as paid in like circumstances in the courts of this State. Any person whose name is mentioned during a proceeding of the commission and who may be adversely affected thereby, may appear personally before the commission on the person's own behalf or file a written statement for incorporation into the record of the proceedings.

(2) The commission shall cause a record to be made of all proceedings pursuant to this

subsection. At the conclusion of proceedings concerning an alleged violation, the commission shall immediately begin deliberations on the evidence and then proceed to determine by majority vote of the members whether probable cause exists that a violation has been committed.

(d) Until a determination of probable cause is made by the commission, all proceedings, including the filing of the complaint, investigation, and hearing shall be confidential unless the person complained of requests an open hearing. In the event the commission determines that probable cause does not exist, the complaint shall be dismissed and the entire record of the proceedings shall be kept confidential at the option of the person complained of.

(e) The commission shall give written notice to the person complained of and to the complainant as to whether probable cause of a violation exists or whether the complaint has been dismissed.

(f) In the event a determination is made that probable cause of a wilful violation exists, the commission shall promptly advise the lieutenant governor of its findings and also the applicable clerk of the state legislature in the case of a state office, or the clerk of the respective county legislative body in the case of a county office. In the event a determination is made that probable cause of an unintentional violation exists, the commission shall issue an order that may require the violator to:

(1) Temporarily cease and desist violation of this subpart; or

(2) File any report, statement, or other information as required by this subpart.

(g) The Commission may only initiate prosecution as provided in section 11-229 when it finds that probable cause of a wilful violation exists.

Sections 11-228 and 11-229, Haw. Rev. Stat. (1985), state:

11-228 Penalties; relief. (a) Any person violating any provision of this subpart other than in section 11-193(b)(1), shall be punishable in the manner prescribed as follows:

(1) If a natural person, the person shall be guilty of a petty misdemeanor and shall be subject to the penalties specified therefor; or

(2) If a corporation, organization, association, or labor union, it shall be punished by a fine not exceeding $1,000; and

(3) Whenever a corporation, organization, association, or labor union violates this subpart, the violation shall be deemed to be also that of the individual directors, officers, or agents of the corporation, organization, association, or labor union, who have knowingly authorized, ordered, or done any of the acts constituting the violation.

(b) Any person may sue for injunctive relief to compel compliance with this subpart.

(c) The provisions of this section shall not be construed to prohibit prosecution under any appropriate provision of the Hawaii Penal Code, including, but not limited to, sections 708-852 and 708-853 (forgery); section 708-855 (criminal simulation); section 708-856 (obtaining signature

by deception); section 708-872 (falsifying business records); and section 708-874 (misapplication of entrusted property).

11-229 Prosecution. (a) For purposes of violation of this subpart, the offices of the attorney general and the prosecuting attorney of the respective counties shall be deemed to have concurrent jurisdiction to be exercised as follows:

(1) Prosecution shall commence with a written request from the commission or upon the issuance of an order of the court;

(2) In the case of state offices, parties, or issues, the attorney general or the prosecuting attorney for the city and county of Honolulu shall prosecute any violation; and

(3) In the case of all other offices, parties, or issues, the attorney general or the prosecuting attorney for the respective county shall prosecute any violation.

In the commission's choice of prosecuting agency, it shall be guided by whether there will be any conflicting interest between the agency and the appointive authority.

(b) The court shall give priority to the expeditious processing of suits under this section.

(c) Prosecution for violation of any provision of this subpart shall not be commenced after two years have elapsed from the date of the violation or date of filing of the report covering the period in which the violation occurred.

STATEMENT OF THE CASE

In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), which involved a prohibition on "third-party" disclosure of information obtained concerning judicial misconduct proceedings, this Court expressly reserved the question whether the First Amendment prohibits the application of statutory confidentiality provisions to "Commission members and staff employees, and witnesses or putative witnesses not officers or employees of the Commission" or other "participants" who initiate proceedings within wholly state-created administrative fora. *Id.* at 837 & n.10.

The validity of such application – if a State did not seek to whitewash the *facts* of which a witness had knowledge – was suggested in *Butterworth v. Smith*, 494 U.S. 624 (1990), and, more generally, in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). But, the federal District Court in Hawaii, and the Ninth Circuit, summarily invalidated the confidentiality provisions (§ 11-216(d)) of Hawaii's campaign spending law – provisions that, in material respect, track those of the Federal Election Campaign Act, 2 U.S.C. §§ 437g(a)(4)(B)(i), 437g(a)(12) (1992), and of a host of other State laws, *see infra*, p. 26 – as applied to a "charging party," who sought to publicize the fact of his initiation of Commission proceedings before any determination of probable cause had been made. The District Court, and the Ninth Circuit, then went on to enjoin § 11-216(d)'s enforcement against *anyone* on the basis of the "facial overbreadth" doctrine.

The courts below applied this "strong medicine" despite numerous text-based and specific reasons why

the statute did not apply to "third parties," did not significantly limit speech in the post-cause-determination phase, and plainly did not limit the discussion of *facts* that might be presented to the Commission. Rejecting even a request to have questions certified to the Supreme Court of Hawaii under its Appellate Rule 13, so that that Court's authoritative construction of § 11-216(d) might be had so as to moot or reshape the important underlying constitutional issues, the Ninth Circuit accepted (at least in lip service) many of the limiting constructions, and found the statutory language "fairly subject" to other suggested limits, but facially nullified the law anyway on the basis of its own view of the Act's "broad purposes." Whether this Court will permit to stand the summary nullification of one of the critical components of Hawaii's election law, which, until the decision of the District Court, had stood on the books for more than a dozen years, is the principal question presented by this case.

1. Like their federal counterparts, Hawaii's campaign laws create elaborate requirements for documenting and reporting campaign contributions and expenditures, set contribution limits, and define, in strict terms, the conditions upon which public funds may be obtained to support campaign activities. *See, e.g.*, Haw. Rev. Stat. §§ 11-195, 11-199, 11-201, 11-204, 11-209. All of these regulations operate "in an area of the most fundamental First Amendment activities," *Buckley v. Valeo*, 424 U.S. 1, 14, 28 (1976) (per curiam). Mindful of the effects that campaign finance regulation can have in stultifying free and robust debate in the political arena, and particularly concerned that the State's regulatory machinery could be abused by strategic litigation in the closing days

of a campaign, Hawaii, like the United States, enacted confidentiality provisions which govern proceedings before the body charged with enforcing the spending and contribution laws. Haw. Rev. Stat. § 11-216(d), which was modeled after 2 U.S.C. § 437g(a)(4) & (12) (West Supp. 1993), and 11 C.F.R. §§ 111.20(a), 111.21(a), 111.21(c) (1993), provides for confidentiality to respondents as follows:

> Until a determination of probable cause is made by the commission, all proceedings, including the filing of the complaint, investigation, and hearing shall be confidential unless the person complained of requests an open hearing. In the event the commission determines that probable cause does not exist, the complaint shall be dismissed and the entire record of the proceedings shall be kept confidential at the option of the person complained of.

Haw. Rev. Stat. § 11-216(d). The statute thus creates two distinct sets of limitations: limitations on "pre-cause finding" disclosure, and limitations on "post-cause finding" disclosure.

a. As in the case of grand jury proceedings, the confidentiality provisions § 11-216(d) operate most broadly before a determination of probable cause is made. Significantly, as the courts below agreed, § 11-216(d) makes no attempt to limit disclosure of the underlying *facts* of which a petitioner may complain about to the Commission, or of which a witness may know before participating in Commission proceedings. Pet. App. 8a; *cf. Butterworth*, 494 U.S. at 635-36 (Florida's "whitewash" law). The only "facts" which complainants

and witnesses may even arguably be barred from disclosing are those which come into their possession solely as a result of the State's creation of the administrative enforcement scheme. Thus, only "the proceedings" before the Commission are required to be confidential. As was contended below, it is also clear that the statute has no impact on third-party non-participants, because once a disclosure has been made beyond those who may have participated in "the proceedings," the facts contained therein are no longer "confidential," and further disclosure cannot be a violation of the law.

b. So far as they go, however, the confidentiality rules, in the pre-cause-determination stage, serve numerous compelling purposes, by limiting the associational confusion that would otherwise obtain in the public eye between accusers and the State, by limiting the incentive to file charges for collateral purposes during the heat of a campaign, *see Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 353 n.17 (1978), by similarly discouraging meritless complaints, *see McDonald v. Smith*, 472 U.S. 479, 484 (1985), and by allowing the Commission to focus its efforts precisely and exclusively on the facts, and to avoid the need to make clarifying statements responding to the status, scope, and possible outcomes of pending cases and investigations. Thus, in addition to lifting burdens that might fall on protected First Amendment activities, *see FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 493-95 (1985), the confidentiality rules vindicate a respondent's "interest in seeing that a decision concerning his or her [protected interests] is not made with excessive haste." *FDIC v. Mallen*, 486 U.S. 230, 243 (1988). Indeed, the Hawaii Legislature was particularly

concerned that "due process shall be provided to anybody complained of," when it enacted its own campaign reform laws. 1979 Haw. H.J. 368 (remarks of Rep. Roehrig) (Clerk's Record ("CR") 18). Confidentiality in the pre-cause stage also promotes settlement, and, for this reason, wise deployment of the Commission's limited enforcement resources. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

c. In the post-cause-decision stage, the statute has far less impact. Disclosure is freely permitted when a finding of probable cause is made, and, if a finding of no probable cause is made, only "the entire record of the proceedings" is subject to confidentiality. § 11-216(d). Read in light of the entire statute, it is clear that the phrase, "the entire record of the proceedings" does not include any *facts* "about the proceedings" or even *records* (plural) of the proceedings that may have been made by private parties either as the proceedings went along, or as extra copies of filed documents were served. For example, the Commission, under subsection 11-216(c)(2), is mandated to "cause a record to be made of all proceedings pursuant to this subsection," and there is no reason to believe that § 11-216(d) applies to anything other than *that* record. This is particularly true in that all "government" records in Hawaii are presumptively open to the public under Haw. Rev. Stat. ch. 92F (Supp. 1992), and the confidentiality mandates of the second sentence of § 11-216(d) are necessary to prevent an automatic duty to force disclosure of all Commission documents. Finally, although Commission discretion to find "probable cause" or its lack is broad, Hawaii has long-recognized judicial remedies to compel the Commission to make a "cause"

finding where there has been a showing that the Commission "acted fraudulently, maliciously, arbitrarily and capriciously." *Marshall Construction Co. Ltd. v. Bigelow*, 29 Haw. 48, 59 (1926). *See also Hoopii v. Sinclair*, 40 Haw. 452, 458-59 (1954); *Horner v. Criminal Injuries Compensation Comm'n*, 54 Haw. 294, 506 P.2d 444 (1985). These remedies provide significant assurance that any speech in support of rejected charges is unmeritorious, and " 'is not immunized by the First Amendment right to petition.' " *McDonald v. Smith*, 472 U.S. 479, 484 (1985) (quoting *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983)); *see also Tennessee v. Elliott*, 478 U.S. 788 (1986) (on preclusion).

2. In 1992, after he filed a complaint with the Hawaii Campaign Spending Commission alleging illegal campaign contributions by the University of Hawaii Professional Assembly, Respondent Ian Lind published the fact that this complaint had been so filed in the "Hawaii Monitor," a non-partisan newsletter. *See* Pet. App. 3a. At the time of this publication, the Commission had not made a finding of probable cause. The union, before the Commission, invoked Haw. Rev. Stat. § 11-216(d), and the Commission viewed the objection as "a complaint against Lind for violation of section 11-216(d)." Pet. App. 3a. Lind then sued, and the United States District Court, which initially ruled that the decision in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), "indicated a willingness to uphold a statute aimed at those who actually participate in the inquiry," Pet. App. 78a,[1]

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[1] In this initial order, the District Court rejected a stipulation that had been prepared under the auspices of a former

ultimately nullified § 11-216(d) both as applied and on its face, in a lengthy decision. *Lind v. Grimmer,* 859 F. Supp. 1317 (D. Haw. 1993), Pet. App. 19a-73a. The District Court rejected Defendants' claim that "the reasoning of *Cohen v. Cowles Media Company,* 111 S. Ct. 2513 (1991), controls this case," Pet. App. 47a, reasoning that "Plaintiff in no way has entered into a contractual relation with the Campaign Spending Commission," and "the *Cowles* Court did not apply the compelling interest test," as a review of the precedents on confidentiality provisions in state ethics and judicial discipline cases suggested to the Court "should be applied to this case." *Id.* at 48a. The Court also rejected the reasoning of District Judge Jose Cabranes' extensive opinion in *Kamasinski v. Judicial Review Council,* 797 F. Supp. 1083 (D. Conn. 1992), which relied on Justice Scalia's concurrence in *Butterworth v. Smith,* 494 U.S. 624 (1990), which clarifies that *Butterworth* holds only that a State may not prohibit a witness who testifies before a confidential proceeding (i.e., a Grand Jury), from "mak[ing] a truthful statement of information he acquired on his own." *Id.* at 636. *See* Pet. App. 43a-45a.

Attorney General, in which the parties stipulated to dismiss the lawsuit with prejudice if the District Court would independently find the statute unconstitutional. The District Court refused to approve the stipulation, being "reluctant to overturn an enactment of the Hawaii Legislature without careful consideration and solid caselaw in support of its decision." Pet. App. 80a. The parties then vacated all previous stipulations, the Defendants answered, and all parties submitted cross-motions for summary judgment. *See* Pet. App. 4a, 19a-20a. In light of this vacatur, both the District Court and the Court of Appeals treated the case fully as if the earlier stipulations had never been made.

The District Court never addressed Judge Cabranes' reasoning, or that of the Third Circuit in *First Amendment Coalition v. Judicial Inquiry and Review Board*, 784 F.2d 467 (3d Cir. 1986) (en banc), on which Judge Cabranes had also relied, and which had flatly held that a confidentiality rule "may be enforced insofar as it would prevent a person, whether a Board member, employee, or counsel, from disclosing proceedings taking place before the Board," and may even validly apply "to witnesses with the exception of their own testimony." *Id.* at 479. Applying the position of the Fourth Circuit in *Baugh v. Judicial Inquiry and Review Commission*, 907 F.2d 440 (4th Cir. 1990), the District Court held that § 11-216(d) was a "content-based" limitation on speech, and was subject to "strict scrutiny." Pet. App. 38a, 48a. The District Court found none of the State's proffered interests "compelling," asserting that the State had no interest in controlling "information of the State's own creation" (*id.* at 60a-62a). The Court rejected any analogy to Grand Jury Proceedings (*id.* at 63a), and found that the statute, despite the Attorney General's protestations, not only applied to third-party, non-participants, but also required total confidentiality of all facts concerning Commission proceedings if the Commission issued a "no cause" finding (*id.* at 64a-66a). On this basis, the Court found § 11-216 unconstitutionally over broad, refusing to give the statute any limiting construction or certify questions to the state Supreme Court. *Id.* at 48a-50a, 66a-71a. The Court enjoined all enforcement of the law.

3. The Ninth Circuit, in an opinion by Judge Canby, and joined by Judges D.W. Nelson and Schroeder, affirmed in all respects. 30 F.3d 1115 (9th Cir. 1994), Pet.

App. 1a-18a. The panel rejected Defendants' *Cowles* argument, holding "[t]he fact that a complaint has been filed is in no meaningful sense information acquired only by virtue of the government's assistance or intervention." Pet. App. 7a. The Ninth Circuit, like the court below it, found the burden-lifting provisions of the statute to be "antithetical" to First Amendment values, and "insufficient to justify restrictions on Lind's speech." Pet. App. 8a. The Court found that there was no "imprimatur of official suspicion" attending the pendency of a complaint before the Commission," Pet. App. 9a, and held that everyone who contributes to a campaign is a "public figure," and "must be prepared to endure a heightened level of criticism – including charges of campaign spending improprieties – precisely in order to promote First Amendment values." *Id.* at 10a. The Court said that Hawaii's interest in discouraging unmeritorious complaints could be remedied by "hiring more staff," *id.* at 12a, and discounted Hawaii's desire to avoid the influence of public pressure on the "probable cause" determination. *Id.* The Court thus found that the law was invalidly applied to an individual who discloses "the fact that he filed a complaint" before the Commission could act. *Id.*

4. The Ninth Circuit then proceeded to invalidate § 11-216(d) on its face under the overbreadth doctrine. The Court rejected pleas for abstention or certification of questions to the Supreme Court of Hawaii, holding that a "complete rewrite" was necessary to save § 11-216(d) from facial invalidity. Pet. App. 14a. Like the District Court, the Ninth Circuit conjectured that the Commission and the state courts, in the absence of any precedent so

indicating, would reject the Attorney General's submission that the language of the statute does not encompass third-party disclosures because such disclosures, by definition, are of "non-confidential" information. Pet. App. 16a-17a. The Court also rejected "a narrowing construction restricting application of the post-probable cause confidentiality provision to release of the official record." *Id.* at 17a n.8. The Court found the statutory language "to be 'fairly subject' to the construction the State urges," *id.*, but then rejected that view because the "context of the entire statute" was somehow to the contrary, and a narrowing construction "makes little sense." *Id.* Ultimately, despite the Defendants' efforts to limit the statute to predecisional disclosures by "participants to the inquiry," the Ninth Circuit held that "[t]he State has failed even to offer examples of plainly constitutional applications of the section," *id.* at 18a, and struck the law down *in toto*.

5. In a petition for rehearing, Defendants urged the Court to reconsider its decision in light of the intervening ruling of this Court in *Turner Broadcasting System v. FCC*, 114 S. Ct. 2445 (1994). That effort was denied. Pet. App. 82a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision carves away Government's discretion in an area of state-created litigation that is fraught with constitutional difficulty: campaign spending. Totally ignoring any interest Hawaii might have in protecting, from burdens that the State itself created in enacting campaign spending regulations, "those of

modest means" who have "pool[ed] their resources to amplify their voices," *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 493-95 (1985), the Ninth Circuit branded as unconstitutional "content discrimination" not only the sort of routine condition on state-authorized litigation that this Court has expressly upheld, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), but the sort of limitation on intrusive state action whose acceptance should have been "beyond debate." *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988). Deeming all political contributors "public figures," and essentially manufacturing, in defiance of all precepts of comity and judicial restraint, a broad range of uncontemplated, uninvoked, and strained applications of § 11-216(d) in order to force a "complete rewrite" of a quite sensible and limited confidentiality provision, the Ninth Circuit's ruling not only turns the First Amendment upside down, but reflects a disturbing result-driven desire to prescribe the "manifestly strong medicine" (*see Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)) of facial nullification for "overbreadth."

This Court's grant of a review in *McIntyre v. Ohio Elections Commission*, No. 93-986 (U.S. argued Oct. 12, 1994), shows in itself why the decision below should not be permitted to stand, and one appropriate course would be to hold this case pending a decision in *McIntyre*, where Ohio's *failure* to accord confidentiality to participants in the political process has drawn a substantial constitutional challenge. If, as seems likely, this Court grants relief against the Ohio statute, the Court may wish to grant the petition, vacate the Ninth Circuit's judgment,

and remand for further consideration in light of that ruling.

Even if *McIntyre* did not present the opportunity to guide the Ninth Circuit to a more appropriate resolution of this case, the judgment below should not be permitted to stand. That judgment sharply conflicts with the decisions of this Court, exacerbates a division in the courts of appeals over the constitutionality of confidentiality rules such as those at stake here, and at a minimum raises issues of nationwide importance, threatening not only the validity of the Federal Election Campaign Act, but the laws of at least ten other States that also prescribe confidentiality for ethics or campaign spending commission cases.

I. Review Should Be Granted to Correct the Ninth Circuit's Invalidation, on First Amendment Grounds, of Confidentiality Provisions that Require "Charging Parties" and Other "Participants to the Inquiry" to Await a Determination of Probable Cause Before Disclosing Information Gained Solely as a Result of the Government's Creation of a Forum For Administrative Litigation of Campaign Spending Complaints.

As the District Court forthrightly recognized, this Court, in striking down application of a confidentiality provision to third-party disclosures in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), expressly reserved issues concerning "a State's power to keep the Commission's proceedings confidential or to punish participants for breach of this mandate." *Id.* at 837. Of all the potential claimants who could have attacked § 11-216(d),

Respondent accordingly stood in the weakest of all possible positions. Not only was he a "participant" to the inquiry, he was its main proponent. Moreover, Mr. Lind avowedly disclosed facts that "he acquire[d] not 'on his own,' " but only by virtue of the government's creation of the forum. *Butterworth v. Smith*, 494 U.S. 624, 636 (1990) (Scalia, J., concurring). The wisdom of the distinction drawn by Justice Scalia in his *Butterworth* concurrence cannot be gainsaid. Had Hawaii sought to whitewash "facts" of which Mr. Lind "knew before he entered" the Campaign Spending Commission, Hawaii's law properly would be deemed invalid on First Amendment grounds. *Id.* As both the Ninth Circuit and the District Court recognized, however, Hawaii's law does not operate in that way. Rather, particularly at the pre-cause-determination stage, it prevents Mr. Lind only from appropriating information that came into existence "only by virtue of the government's assistance or intervention." *See Snepp v. United States*, 444 U.S. 507 (1980).

It was for this reason, of course, that Petitioners relied in the courts below on this Court's decision in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), as offering a helpful analogy to the instant situation. Both the Ninth Circuit, and the District Court, made much of the fact that Mr. Lind did not sign any contract agreeing to confidentiality. But neither did the Minneapolis Star & Tribune, yet Minnesota law, without regard to party or ideology, could nonetheless, consistent with the First Amendment, estop the newspaper from breaching an implied promise to honor the understanding of its source. Indeed, in every meaningful sense, Hawaii has structured litigation before

the Campaign Spending Commission as a place of "limited discourse," *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 802 (1985), and Mr. Lind was bound to honor those limits. *See also Waimea Falls Park, Inc. v. Brown*, 6 Haw. App. 83, 98, 712 P.2d 1136, 1146 (1985) (Hawaii law of estoppel). As this Court ruled in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), the processes for obtaining discovery "are a matter of legislative grace," and "[t]he prevention of the abuse that can attend the coerced production of information under a State's discovery rule is sufficient justification for the authorization of protective orders." *Id.* at 32, 35-36. Here, too, Mr. Lind's ability to litigate before the Commission was entirely "a matter of legislative grace." Mr. Lind did not have the right to appropriate the Commission's name, in violation of the statutory conditions on his suit. *See New York Times Co. v. United States*, 403 U.S. 713, 728-30 (1971) (Stewart, J., concurring); *id.* at 733 (White, J., concurring); *id.* at 741-43 (Marshall, J., concurring). The Ninth Circuit's ipse dixit – that Mr. Lind "in no meaningful sense" disclosed "information acquired only by virtue of the government's assistance or intervention" (Pet. App. 7a n.2) – "fundamentally misconstrue[s] the facts of this case," *NCAA v. Tarkanian*, 488 U.S. 179, 192 (1988), and should not bar review.

Indeed, even on the panel's own terms, this case could not be one of impermissible "content discrimination." Recently, in *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994), the Court clarified that the pejorative label, "content discrimination," cannot apply whenever the law favors "one set of speakers" "over another," unless the law "reflects the Government's preference for

the *substance* of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Id.* at 2467 (emphasis added). Here, however, the confidentiality requirement affects not only "charging parties," but Commission members and staff, as well as witnesses, whatever side of the controversy they might be on. The law is neutral as to both inculpatory and exculpatory information, and therefore does not reflect "a content preference." *Id.* Indeed, given the limits on post-decision confidentiality, Hawaii's law is nothing more than a classic "time, place, and manner" regulation that need only serve a substantial government interest in a narrowly tailored way. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Hawaii's law not only meets that standard, but, as against "charging parties" particularly, would meet "strict scrutiny" as well. As Judge Cabranes noted in a related context:

> [The *Baugh* court's analysis of whether a compelling state interest is properly served by confidentiality] is neither controlling nor persuasive, for it fails to capture the panoply of state interests at stake. There can be no doubt that, if given the opportunity, mischievous litigants would file complaints with a judicial review commission, criticize the commission for failing to investigate the complaint aggressively or to make the threshold finding of probable cause. In such circumstances, an accused judge and potential witnesses could fall under a media spotlight, thus hampering the commission's investigation as well as limiting the possibility of voluntary retirement or other corrective steps. The ready availability and attractiveness

> of this option to irresponsible complainants would doubtless greatly increase the number of meritless complaints, thus overburdening the commission and hindering investigations of potentially legitimate complaints.

Kamasinski v. Judicial Review Council, 797 F. Supp. 1083, 1095 (D. Conn. 1992). The Ninth Circuit, recognizing the force of this argument, sought to diminish it on the basis of the unjustified notion that, in essence, judges somehow deserve more "privacy" than other "public figures," when it comes to "strong evidence of corruption or of ethical violations." *See* Pet. App. 11a-12a & n.4.

This cannot be the law. Indeed, Hawaii has not only a "compelling interest in preserving the integrity of its election process," *Burson v. Freeman*, 112 S. Ct. 1846, 1852 (1992), it has a critical interest in avoiding distortion of that process through abuse of the State's regulatory machinery. Mr. Lind, after all, did not even show in the District Court that his own petition had probable cause to back it; thus, there was no showing that his speech enjoyed Constitutional protection at all. *McDonald v. Smith*, 472 U.S. 479, 484 (1985). For all of these reasons, the Ninth Circuit's as-applied nullification of Haw. Rev. Stat. § 11-216(d), is wrong, and a writ should issue.

II. Review Should Be Granted to Correct the Ninth Circuit's Disregard of Settled Principles of Comity And Restraint, Which the Court of Appeals Ignored in Summarily Nullifying Haw. Rev. Stat. § 11-216(d) as Facially and Unconstitutionally Overbroad.

This Court has repeatedly admonished that "application of the overbreadth doctrine is, 'manifestly strong

medicine.' " *Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 574 (1987).

The Ninth Circuit's judgment fails to heed this settled precept, on numerous different fronts. First, for the reasons stated in Part I, the Ninth Circuit failed to recognize " 'a whole range of easily identifiable and constitutionally . . . proscribable . . . conduct' " to which § 11-216(d) may be applied. *Secretary of State v. J.H. Munson Co.*, 467 U.S. 947, 965 (1984). Mr. Lind's case, and those of all pre-decisional disclosures, undoubtedly are situations where § 11-216(d) is validly applied. Review of the Ninth Circuit's "as-applied" ruling will demonstrate that the facial nullification also was plainly wrong, and should be reversed by this Court.

More importantly, the Ninth Circuit disregarded settled rules of construction, which this Court has consistently employed to save statutes from federal nullification. Indeed, the Ninth Circuit's "broad reading" of the prohibitory effect of § 11-216(d) "ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulty," and amounts to "plain error." *Frisby v. Schultz*, 487 U.S. 474, 483 (1988). The Ninth Circuit's mandatory duty was to "presume *any* narrowing construction or practice to which the law is 'fairly susceptible.' " *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 n.1 (1988). Certainly the Ninth Circuit's diaphanous appeal to the statute's "purpose" failed to heed this admonition. Hawaii law, by reasonable construction of the terms "confidential" and "entire record," eliminates the two central "overbreadth" problems identified by the Ninth Circuit, *i.e.*, third-party disclosures, and post-decisional confidentiality. The Ninth

Circuit's decision provides no good rationale for avoiding those constructions itself, or for avoiding a certified question proceeding pursuant to Haw. R. App. P. 13. *See Virginia v. American Booksellers, Inc.*, 484 U.S. 383, 395-96 (1988). Certiorari should be granted to reaffirm this Court's commitment to precepts of comity and restraint. The judgment below dangerously overprescribes the "strong medicine" of facial nullification, and this Court's resources are necessary to correct such cavalier intervention.

III. Review Should Be Granted to Settle the Deep and Continuing Conflicts in the Lower Courts Over the Constitutionality of Confidentiality Provisions that Bar Disclosure of the Course of Administrative Action; the Issue, which Affects Not Only Administration of the Federal Election Campaign Act, but Also the Laws of at Least Ten Other States, is of National Import.

The Ninth Circuit's decision purports to dress the lower courts' opinions in this area as largely in agreement. *See* Pet. App. 5a n.1, 12a n.5. But the disagreement among the lower courts extends much farther than merely with Judge Cabranes' opinion in *Kamasinski*, discussed *supra*. In *First Amendment Coalition v. Judicial Inquiry & Review Board*, 794 F.2d 467 (3d Cir. 1986) (en banc), the *en banc* Third Circuit expressly held that even involuntary witnesses, who "did not seek to avail themselves of the Board's processes," *id.* at 478, could be prevented "from disclosing proceedings before the board," including the substance of testimony "of another witness whom they may hear testify," or "the comments

of Board members or staff that are overheard during their appearance." *Id.* at 479. This rule of decision, the Court held, applied a fortiori to those who "avail[ed] themselves of the Board's processes," finding mandatory confidentiality in that context wholly supported, even absent "compelling state interests," by *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). *See* 784 F.2d at 478. Similarly, as the New York Court of Appeals wrote in *Johnson Newspaper Corp. v. Melino*, 77 N.Y.2d 1, 564 N.E.2d 1046, 563 N.Y.S.2d 380 (1990), "there is no suggestion that professional disciplinary hearings have any tradition of being open to the public and no showing that the public access plays 'a significant positive role' in the functioning of the proceedings," and hence "there is no First Amendment right of access." 77 N.Y.2d at 9, 564 N.E.2d at 1049. Both the Ninth Circuit and the District Court relied heavily on *Baugh v. Judicial Inquiry and Review Comm'n*, 907 F.2d 440 (4th Cir. 1990), which held that any time a State effects a "direct ban on speech concerning [a] single topic," such a ban "can only be justified by the content of the speech." *Id.* at 444. Although this analysis is both wrong and inapt to the Hawaii case, the reliance of the Ninth Circuit, the Nation's largest, on *Baugh* demonstrates a compelling need for this Court to step in and provide guidance to the lower federal courts.

Resolution of the issues presented is also warranted by the truly national significance of this case. Hawaii's confidentiality provision is very similar, particularly as we construe it, to federal statutes and regulations which prohibit publication of any "complaint filed with the Commission," "any notification [of complaint] sent by the

Commission [to a respondent,] any investigation conducted by the Commission, [and] any findings made by the Commission," unless the Commission "makes a finding of no reason to believe or otherwise terminates its proceedings," except insofar as may be necessary to "the introduction of evidence in the Courts of the United States which could properly be introduced pursuant to the Federal Rules of Evidence or Federal Rules of Civil Procedure." 11 C.F.R. §§ 111.20(a), 111.21(a), 111.21(c) (1993) (construing 2 U.S.C. § 437g(a)(4) & (12) (West Supp. 1993)). The judgment below also calls into doubt the campaign finance or ethics laws of Arkansas (Ark. Code Ann. § 7-6-218(b)(3) (1990)), Illinois (Ill. Comp. Stat. Ann. Ch. 10, § 5/9-21 (1993)), Iowa (Iowa Code Ann. § 56.11.2 (1993)), Kansas (Kan. Stat. Ann. 25-4161 (Supp. 1992)), Louisiana (La. Stat. Ann. § 1511.8 (Supp. 1993)), Missouri (Mo. Stat. Ann. (Vernon) Tit. IX, Ch. 130, § 130.066 (1992)), North Dakota (N.D. Cent. Code Tit. 16.1, § 16.1-09-06 (1992)), Rhode Island (R.I. Gen. L. Ann. § 17-25-5(a)(7) (1992)), South Carolina (S.C. Code Ann. § 8-13-320(o) (1991)), and Tennessee (Tenn. Code Ann. § 2-11-202(5) (1992)). Given the broad array of statutes threatened by the Ninth Circuit's decision in this case, the factors warranting this Court's exercise of the power of review are compellingly present. Certiorari should issue.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari. The Court may wish to hold this Petition pending a decision in *McIntyre v. Ohio Elections Commission*, No. 93-986 (U.S. argued Oct. 12, 1994), but in any event the Court should grant the petition for certiorari.

Dated: Honolulu, Hawaii, November 15, 1994.

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APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IAN Y. LIND, *Plaintiff-Appellee,* v. GARY G. GRIMMER; LINDA K. ROSE-HILL; JAMES C.F. WANG; ROBERT Y. WATADA, Individually, and in their capacities as Commissioners of the Campaign Spending Commission, State of Hawaii: and JACK M.K. GONZALES, Individually, and in his capacity as the Executive Director of the Campaign Spending Commission, State of Hawaii, *Defendants-Appellants.*	No. 93-16021 D.C. No. CV-92-00415-ACK OPINION

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Argued and Submitted
April 12, 1994 – San Francisco, California

(Filed July 22, 1994)

Before: Mary M. Schroeder, Dorothy W. Nelson and William C. Canby, Jr., Circuit Judges.

OPINION

CANBY, CIRCUIT JUDGE:

Hawaii Rev. Stat. § 11-216(d) prohibits disclosure of information concerning investigations undertaken by Hawaii's Campaign Spending Commission. The State of Hawaii appeals the district court's grant of summary judgment, which enjoined enforcement of the statute on the ground that it violates the First Amendment of the United States Constitution, both as applied to appellee Lind and on its face. We affirm.

I. BACKGROUND

When a complaint is filed with Hawaii's Campaign Spending Commission, the Commission is required to determine whether there is probable cause that a campaign spending violation occurred, and if so, whether that violation was unintentional or willful. Haw. Rev. Stat. § 11-216. If the Commission finds probable cause that a willful violation occurred, it must advise the lieutenant governor, and it may initiate a prosecution. Haw. Rev. Stat. § 11-216(f)-(g). If it finds probable cause that an unintentional violation occurred, it must order the cited party to remedy that violation. Haw. Rev. Stat. § 11-216(f). If it finds no probable cause, it need take no further action. *See id.*

At issue in this appeal is Haw. Rev. Stat. § 11-216(d), which requires that all aspects of the Commission's activities remain confidential while an investigation is pending, and that the entire record of an investigation remain

confidential if the Commission determines that there is no probable cause that a violation occurred:

> Until a determination of probable cause is made by the commission, all proceedings, including the filing of the complaint, investigation, and hearing shall be confidential unless the person complained of requests an open hearing. In the event the commission determines that probable cause does not exist, the complaint shall be dismissed and the entire record of the proceedings shall be kept confidential at the option of the person complained of. Breach of this provision is a crime punishable by up to thirty days in jail and a fine of up to $1,000. Haw. Rev. Stat. § 11-228; § 706-663.

Appellee Ian Lind was author, editor, and publisher of the "Hawaii Monitor," an independent non-partisan newsletter devoted to discussing election campaign issues. In June of 1992, Lind published in his newsletter the fact that he had filed a complaint against the University of Hawaii Professional Assembly alleging that the Assembly failed to disclose certain campaign contributions during the 1990 election and that it made excessive and prohibited contributions in support of Governor John D. Waihee's election. The Assembly responded by asking the Commission to clarify the applicability of section 11-216(d) to Lind's complaint. The Commission, in turn, decided to treat this request as a complaint against Lind for violation of section 11-216(d). Lind responded by bringing this action in federal district court seeking a declaration that section 11-216(d) violated his rights under the First Amendment, and an injunction against its enforcement.

Just fifteen days after Lind's complaint was filed, the parties submitted to the district court a stipulation of settlement, proposing that the court dismiss Lind's complaint with prejudice and declare that section 11-216(d) violated the First Amendment and was unenforceable. The district court, however, refused to do so without additional briefing. Thereafter, the State changed its position and decided to defend the statute. Following cross motions for summary judgment, the district court held section 11-216(d) unconstitutional as applied to Lind, held it unconstitutionally overbroad, and permanently enjoined its enforcement. This appeal followed.

II. LEVEL OF SCRUTINY

[1] A statute regulating speech is content-neutral only if the state can justify it without reference either to the content of the speech it restricts or to the direct effect of that speech on listeners. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Here, the State asserts a variety of purposes for section 11-216(d): it serves: (a) to prevent the Commission's credibility from being invoked to support "scandalous charges," (b) to protect "fledgling political groups and candidates [from] the publicity that would befall them from open proceedings," (c) to prevent candidates and their supporters from being "unduly tarred by a vindictive complaint," (d) to promote settlement of disputes over violations of spending laws, and (e) to eliminate distractions and collateral concerns that would exist if commission proceedings were made public. Because these concerns all stem from the direct communicative impact of speech, we conclude that section

11-216(d) regulates speech on the basis of its content.[1] Moreover, the speech it restricts, speech about political processes and governmental investigations of wrongdoing by public officials, falls near to the core of the First Amendment. *See New York Times v. Sullivan*, 376 U.S. 254, 270-71 (1964). Therefore, the statute is presumptively unconstitutional. *See R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992). It will survive scrutiny only if it is narrowly drawn and is necessary to serve a compelling state interest, *Boos v. Barry*, 485 U.S. 312, 321 (1988), or if the speech it regulates otherwise is undeserving of full protection, *see e.g., R.A.V.*, 112 S. Ct. at 2543 (listing categories); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (devaluing information acquired through civil discovery).

III. AS APPLIED TO LIND

A

It is clear that the speech restricted by section 11-216(d) does not fall into any of the traditional categories, such as fighting words and obscenity, that are undeserving of full First Amendment protection. Nonetheless,

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[1] This conclusion comports with that reached by the majority of courts that have considered comparable statutes. *See e.g., Butterworth v. Smith*, 494 U.S. 624 (1990) (confidentiality of grand jury testimony); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (testimony before judicial review board); *Baugh v. Judicial Inquiry & Review Comm'n*, 907 F.2d 440 (4th Cir. 1990) (same); *First Amendment Coalition v. Judicial Inquiry & Review Board*, 784 F.2d 467 (3d Cir. 1986) (en banc) (same); *Kamasinski v. Judicial Review Council*, 797 F. Supp. 1083 (D.Conn. 1992) (same).

Hawaii contends that the First Amendment does not protect individuals who divulge the fact that they have filed a complaint with its Campaign Spending Commission. It relies on *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991). In *Cowles*, the Supreme Court considered whether the First Amendment barred a plaintiff from recovering damages under Minnesota's promissory estoppel law when a newspaper breached its promise of confidentiality given to the plaintiff in exchange for information. The Court held that the First Amendment did not bar recovery, for two reasons. First, it noted that promissory estoppel is a law of general applicability, and its application to the press posed only an "incidental" and "constitutionally insignificant" burden on speech. *Id.* at 2519. Second, the Court observed that the agreement between Cohen and the newspaper was in the nature of a contract, and that any legal obligations and restrictions on publication of truthful information therefore were "self-imposed." *Id.* The State argues that Lind similarly struck a bargain with the Commission when he filed a complaint knowing that, by doing so, he would be subject to section 11-216(d)'s confidentiality provisions. The State contends that he therefore imposed section 11-216(d)'s restrictions on himself, and like the newspaper in *Cowles*, cannot now complain that those restrictions violate his First Amendment rights.

This novel argument is based upon a dramatic misconception of both the import of *Cowles* and the effect of section 11-216(d). Section 11-216(d) is not a content-neutral law of general applicability, but one intended to impose direct and significant restrictions on speech. Thus, the State is not relieved of its burden (as was the

plaintiff in *Cowles*) of demonstrating that the challenged provisions are necessary to serve a compelling interest. As we point out below, it has failed to carry that burden. Furthermore, the restrictions placed on Lind's speech, embodied in section 11-216(d), are state-created, and existed independently of, and prior to, any interaction between Lind and the Campaign Spending Commission. Therefore, the interaction between Lind and the Commission cannot be characterized as a simple bargain in which Lind obtained use of the Commission's investigatory machinery in exchange for his silence. The State may not condition Lind's ability to trigger an investigation on the theory that by filing a complaint he bargained away his First Amendment rights. *Cf. Sherbert v. Verner,* 374 U.S. 398 (1963). *Cowles,* in short, is irrelevant to the case at hand.

We conclude that section 11-216(d) regulates fully protected speech.[2] Unless it is narrowly tailored and necessary to promote compelling state interests, it cannot stand.

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[2] We reject the State's alternative assertion that section 11-216(d) only restricts speech concerning information a speaker acquires with the assistance or intervention of the government, and that such speech is unprotected by the First Amendment. The fact that a complaint has been filed is in no meaningful sense information acquired only by virtue of the government's assistance or intervention.

B

[2] According to Hawaii, section 11-216(d) promotes its interest in "the free functioning of the electoral system," and in "fostering an 'uninhibited, robust, and wide-open' debate out in the political arena." We have no doubt that these are compelling interests. We conclude, however, that prohibiting disclosure that a complaint has been filed does little to serve these interests, and indeed in many ways is antithetical to them.

1

[3] The State is concerned primarily that, without section 11-216(d), candidates might be discouraged from entering political races; they are "not paid public servants, who can be expected to endure the slings and arrows of criticism in the press and elsewhere." The State acknowledges that section 11-216(d) does not prevent anyone from publicly charging candidates or their supporters with violations of spending regulations, and that it does not prevent people from publicly airing whatever evidence they may have to support their allegations. It contends, however, that disclosure of the fact that a complaint has been filed somehow lends the State's imprimatur to such charges, dramatically increasing their effectiveness. In the State's words, "At its core, the confidentiality requirement precludes the Commission's credibility from being invoked to buttress scandalous charges in the heat of a campaign."

[4] These concerns are insufficient to justify restrictions on Lind's speech. The effect that the State fears can be countered by the truthful assertion that anyone can file

a complaint with the Commission, for any reason, regardless of its merit. Because the State has no influence over when or whether a complaint is filed, the fact of filing simply cannot signal the State's approval of a complainant's charges.[3] As Justice Brandeis observed nearly seventy years ago, "If there be time to . . . avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

In fact, what the State is attempting to do is exactly the sort of thing that the First Amendment is designed to guard against. *See Landmark*, 435 U.S. at 845. Hawaii argues, in effect, that it is justified in restricting political speech about complaints before the Campaign Spending Commission in order to promote other political speech. However, it is not the function of government to promote speech it deems more valuable and to suppress speech it deems less valuable. *See Whitney*, 274 U.S. at 375-376. The speech that Hawaii seeks to restrict may have a discouraging effect on certain candidates and their supporters. And as the State observes, some of those affected by that

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[3] In this respect, the confidentiality provisions at issue here differ from secrecy provisions in the grand jury context. Grand jury investigations are triggered either by the grand jury itself or by a request from a prosecutor. Consequently, the mere fact of a grand jury investigation carries with it the imprimatur of official suspicion.

Another reason to keep secret the existence of a grand jury investigation is to prevent those being investigated from fleeing. *Butterworth v. Smith*, 494 U.S. 624, 632 (1990). This justification is irrelevant here as well, because those being investigated by the Campaign Spending Commission must be notified when a complaint is filed. *See* Haw. Rev. Stat. § 11-216(a)-(c).

speech may not (yet) be paid public servants. But they surely are public figures, and therefore they must be prepared to endure a heightened level of criticism – including charges of campaign spending improprieties – precisely in order to promote First Amendment values. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964). Candidates' supporters, by injecting themselves into public debate and attempting financially to influence its outcome, also must be prepared to suffer what to them may be unpleasant discussion of their contribution practices. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

With regard to the danger that people knowingly may bring unmeritorious charges of campaign spending improprieties in order to harass, the State has not shown that the victim will be without civil tort remedies. *See generally New York Times v. Sullivan*, 376 U.S. 254 (1964). Moreover, even if criminal sanctions were necessary to discourage vexatious complaints, section 11-216(d) is not narrowly drawn to achieve that purpose; it also prohibits disclosure of complaints legitimately and truthfully alleging serious improprieties.

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Secondarily, the State asserts that confidentiality facilitates the Commission's work. It predicts that permitting disclosure that a complaint has been filed would encourage people to lodge unmeritorious complaints, stimulate public inquiries concerning the status of pending investigations, and bring public pressure to bear in attempts to influence the Commission's investigations, all of which will overburden and distract the Commission.

The State also contends that disclosure that a complaint has been filed would remove an important incentive for cited parties to settle, thereby further increasing the Commission's work load.

In *Landmark,* the Supreme Court held unconstitutional a Virginia statute that prevented third parties from divulging truthful information regarding proceedings before the state Judicial Inquiry and Review Commission. Virginia advanced many of the arguments that Hawaii presses here, claiming that its statute was necessary to preserve the "orderly administration of justice." *Landmark,* 435 U.S. at 843. In rejecting Virginia's position, the Court noted that, although the state asserted a compelling interest, it had failed to produce a "solidity of evidence" showing that the proscribed speech posed a sufficiently imminent threat to that interest. *Id.* at 845. Hawaii similarly has failed to carry that burden here. It has "offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined." *Id.* at 841.

[5] In the event that the Commission becomes overburdened with unmeritorious complaints, public inquiries, or cases that fail to settle,[4] it could solve this

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[4] The dynamics of settlement here differ from those in judicial review board inquiries. In that context, if there is strong evidence of corruption or of ethical violations, a review board's primary goal is to remove the offending judge from the bench rapidly. *See First Amendment Coalition v. Judicial Inquiry & Rev. Bd.*, 784 F.2d 467, 476 (3d Cir. 1986). Experience has shown that a particularly effective method to achieve this goal is to provide a

problem without impairing First Amendment rights by streamlining its investigatory processes or hiring more staff. *See id.* at 843 (requiring consideration of less restrictive alternatives). As for public pressure's influencing the Commission's decisions, such possibilities rarely justify abridgment of First Amendment rights. *See Landmark,* 435 U.S. 829; *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539 (1976); *Wood v. Georgia,* 370 U.S. 375 (1962). The vast majority of deliberative bodies undertake investigations with full exposure to the public, and with no apparent ill effects. The State offers no reason to doubt that the situation would be any different here.

[6] We conclude that to the extent Haw. Rev. Stat. § 11-216(d) prevents as individual from disclosing the fact that he filed a complaint with the Campaign Spending Commission, it is unconstitutional.[5]

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judge with the ability quietly to retire in exchange for confidentiality concerning the charges brought against him. *Id.* In contrast, the Campaign Spending Commission has as its goal the cessation of nonwillful spending violations and the prosecution of willful violations; its goal is not to remove probable violators from a race. Therefore, the prospect of settlement is valuable mainly only to decrease the Commission's work load.

[5] The majority of courts that have addressed this question (all in the context of judicial review board of ethics Commission proceedings) have come to the same conclusion. *See First Amendment Coalition v. Judicial Inquiry & Review Board,* 784 F.2d 467 (3d Cir. 1986); *Doe v. Florida Judicial Qualifications Comm'n,* 748 F. Supp. 1520 (S.D. Fla. 1990); *Providence Journal Co. v. Newton,* 723 F. Supp. 846 (D.R.I. 1989). *But see, Kamasinski v. Judicial Review Council,* 797 F. Supp. 1083 (D. Conn. 1992).

IV. OVERBREADTH

A

In addition to holding section 11-216(d) invalid as applied to Lind, the district court found the section unconstitutionally overbroad, and enjoined its enforcement in all circumstances. As a preliminary matter, the State argues that the district court erred in reaching this issue for a variety of reasons, none of which we find meritorious.

First, Hawaii insists that the district court's overbreadth determination must be reversed because the court granted summary judgment on the issue sua sponte, depriving the State of the notice required by Fed. R. Civ. Proc. 56. We need not decide whether the district court erred in this regard. Whether a statute is facially unconstitutional is a matter of law, which this court reviews de novo. Therefore, any lack of notice would not compel reversal. *See Schwartz v. Pillsbury, Inc.*, 969 F.2d 840, 845 n.3 (9th Cir. 1992).[6]

Next, the State argues that the district court should have abstained under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), and certified the question of the

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[6] The State implies that issues of fact are involved, having filed a Rule 56(f) motion in order to present statistics that most complaints to the Commission are resolved informally (and alleging that section 11-216(d) restrictions do not apply to informally resolved complaints). The district court properly rejected this motion, noting that these statistics have no bearing on whether the statute is overbroad. The issue is not how many times section 11-216(d) has been applied, but rather the extent to which it potentially may impair First Amendment rights.

statute's construction to the Hawaii Supreme Court. We review for abuse of discretion a district court's decision not to abstain under *Pullman*, *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989), and find no error.

A federal court should abstain only in exceptional circumstances. *Houston v. Hill*, 482 U.S. 451, 467 (1987) and only where the complaint involves sensitive areas of social policy that federal courts ought not to enter, *Ripplinger*, 868 F.2d at 1048. While campaign spending regulation may qualify as an area that federal courts should avoid if possible, section 11-216(d) does not regulate campaign spending. It regulates speech about campaign spending. This is not an area of peculiarly local concern, but an area primarily of federal concern. *See id.* ("abstention is inappropriate for cases where statutes are justifiably attacked on their face as abridging free expression" (citations and quotations omitted)). Furthermore, abstention is appropriate only if the statute at issue is "fairly subject" to an interpretation that will save it from invalidation. *Harmon v. Forssenius*, 380 U.S. 528, 534-35 (1965). In view of the variety of applications of section 11-216(d) that are unconstitutional (see below), we agree with the district court that nothing short of a complete rewrite of the statute will save it. In these circumstances, neither abstention nor certification is appropriate. *Houston v. Hill*, 482 U.S. at 470-71. The district court did not abuse its discretion in refusing to abstain, and we reject the State's suggestion that we stay our hand and certify the matter to the Supreme Court of Hawaii.[7]

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[7] *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988), is not to the contrary. Although the Supreme Court abstained in

Finally, the State contends that we may not reach the question of overbreadth because, if the statute is unconstitutional as applied to Lind, he has no standing to challenge it as overbroad. *See e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-04 (1985):

> [While facial invalidation due to overbreadth may be proper when the statute is constitutional as applied to the party before the court, it] is otherwise where the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish. . . . There is then no want of a proper party to challenge the statute, no concern that an attack on the statute will be unduly delayed or protected speech discouraged. The statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact.

Id. at 504. *See also Renne v. Geary*, 501 U.S. 312, 324 (1991). *Brockett* and *Geary*, however, deal with an issue different from that presented by Lind. Overbreadth doctrine is an exception to the usual rules of standing, designed to prevent the chilling effect overbroad statutes may have on parties not before the court. *See Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 575-76 (1987). Where a statute's overbreadth is substantial, its chilling effect is likely to be significant, and consequently the entire statute may be invalidated to protect

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that First Amendment case, it noted that it did so because of several "unique" factors. *Id.* at 393. Among these factors was that the state conceded that the statute at issue was unconstitutional on the plaintiff's construction and that it therefore declined to defend it against that construction. Such is not the case here.

First Amendment interests. *See id. Brockett* and *Geary* simply recognize that when a statute's only unconstitutional application is the one directed at a party before the court, invalidation of that portion of the statute obviates any chilling effect the statute may have, and thus eliminates any justification for declaring the statute invalid in all its applications.

[7] Here, in contrast, after striking the portion of section 11-216(d) that is unconstitutional as applied to Lind, and even assuming that the statute may have some constitutional applications, we are left with the fact that section 11-216(d) has numerous other potential applications that are unconstitutional. In this circumstance, the dangers that the overbreadth doctrine is designed to avert – a potential chilling effect on speech and lack of a proper party before the court – are present. Consequently Lind has standing to raise the issue.

B

[8] We find that section 11-216(d) imposes criminal penalties for a substantial range of constitutionally protected conduct, while its "plainly legitimate sweep" is quite limited. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Accordingly, the statute must be invalidated on its face. *See id.*

[9] Not only does section 11-216(d) prohibit complainants from divulging the fact that they have filed a complaint, but it also prohibits third parties, who are strangers to the Commission's investigation, from divulging anything that they might lawfully learn about an investigation, both before and after the Commission

makes a probable cause determination. This prohibition is patently unconstitutional. *See Landmark*, 435 U.S. 829. If the Commission makes a finding of no probable cause, the statute prohibits those same third parties, should they legally acquire a portion of the record of the Commission's proceedings, from releasing it. This, too, is unconstitutional. *See id.; see also New York Times Co. v. United States*, 403 U.S. 713 (1971). Section 11-216(d) also prohibits all persons appearing before the Commission, not just the complainant, from divulging both the fact that a complaint has been filed and what they told the Commission – both before and after the Commission makes a probable cause determination.[8] While the validity of some of these

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[8] The State urges us to apply a narrowing construction restricting application of the post-probable cause confidentiality provision to release of the official record. This provision reads:

> In the event the Commission determines that probable cause does not exist, . . . the entire record of the proceedings shall be kept confidential at the option of the person complained of.

Read in isolation, this sentence appears to be "fairly subject" to the construction the State urges. *See Harmon v. Forssenius*, 380 U.S. 528, 535 (1965). However, in the context of the entire statute, which seeks to keep confidential not just official documents, but all information about the Commission's proceedings, we agree with the district court that the construction the State urges makes little sense. That construction is even less plausible in light of the broad purposes that the State insists underlie the statute. *Cf. Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975) ("Particularly where . . . appellee offers several distinct justifications for the ordinance in its broadest terms, there is no need to assume the ordinance can or will be decisively narrowed.").

prohibitions as applied during the pendency of the investigation may be arguable, we need not rule on that question because the prohibitions are not so limited. Once the Commission has made its probable cause determination, their application clearly is unconstitutional. *Cf. Butterworth*, 494 U.S. at 626. Section 11-216(d) plainly prohibits a wide range of constitutionally protected conduct.

[10] The State has failed even to offer examples of plainly constitutional applications of the section. Accordingly, on this record we must conclude that the overbreadth of section 11-216(d) is "not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. Whether the State, with a showing of more substantial interests, could sustain a far more narrowly drawn statute, is a question we need not address today. All we hold is that the statute before us, on the record presented, is fatally overbroad.

V. CONCLUSION

Section 11-216(d) of the Hawaii Revised Statutes is unconstitutional both on its face and as applied to appellee Lind. Accordingly, the judgment of the district court is affirmed, and the case remanded to the district court for a determination of the reasonable attorney's fees to be awarded to Lind in connection with his efforts in the district court and on this appeal. *See* 42 U.S.C. § 1988.

AFFIRMED and REMANDED.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

IAN Y. LIND, Plaintiff, vs. GARY G. GRIMMER, LINDA K. ROSEHILL, JAMES C.F. WANG, ROBERT Y. WATADA, Individually, and in their capacities as Commissioners of the Campaign Spending Commission, State of Hawaii, and JACK M.K. GONZALES, Individually, and in his capacity as the Executive Director of the Campaign Spending Commission, State of Hawaii, Defendants.	)	CIVIL NO. 92-00415 ACK

(Filed Apr. 20, 1993)

ORDER GRANTING PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT AND FOR A PERMANENT INJUNCTION AND DENYING DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

INTRODUCTION

This case is now before the Court on Plaintiff's motion for summary judgment and Defendants' cross-

motions for judgment on the pleadings, or, in the alternative, for summary judgment.

Plaintiff seeks: (1) a declaratory ruling that Section 11-216(d)[1], Hawaii Revised Statutes ("HRS"), is unconstitutional and invalid because it violates the Plaintiff's

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[1] Hawaii Revised Statutes, Section 11-216(d) reads as follows:

§ 11-216. Complaints, investigation, and notice.

* * *

(d) Until a determination of probable cause is made by the commission, all proceedings, including the filing of the complaint, investigation, and hearing shall be confidential unless the person complained of requests an open hearing. In the event the commission determines that probable cause does not exist, the complaint shall be dismissed and the entire record of the proceedings shall be kept confidential at the option of the person complained of.

Haw. Rev. Stat. § 11-216(d) (1988 & Supp. 1992).

Violations of HRS § 11-216(d) are covered by HRS § 11-228 which reads:

§ 11-228. Penalties; relief.

(a) Any person violating any provision of this subpart [B. Election Campaign Contributions and Expenditures; HRS 11-191 through HRS § 11-229] other than in section 11-193(b) (1), shall be punishable in the manner prescribed as follows:

(1) If a natural person, the person shall be guilty of a petty misdemeanor and shall be subject to the penalties specified therefor; or

(2) If a corporation, organization, association, or labor union, it shall be punished by a fine not exceeding $1,000; and

(3) Whenever a corporation, organization, association, or labor union violates this subpart, the violation shall be deemed to be also that of the individual directors, officers, or agents of the

rights of Freedom of Speech and Freedom of the Press in violation of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983; and (2) a permanent injunction enjoining the enforcement of HRS § 11-216(d).

Defendants oppose Plaintiff's motion for summary judgment and seek: (1) judgment on the pleadings, or summary judgment that HRS § 11-216(d) is constitutional as applied to "charging parties"; or (2) in the alternative suggest this Court certify HRS § 11-216(d) to the Hawaii Supreme Court for a limiting construction.

The issues presented are: (1) whether HRS § 11-216(d) is constitutional in its present form; (2) whether HRS § 11-216(d) is constitutional in the limited use proposed by Defendants; and (3) whether HRS § 11-216(d) should be certified to the Hawaii Supreme Court for a limiting construction.

For the reasons discussed below, this Court grants Plaintiff's motion for summary judgment and for a permanent injunction and denies Defendants' motion for judgment on the pleadings, or in the alternative, motion for summary judgment.

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corporation, organization, association, or labor union, who have knowingly authorised [sic], ordered, or done any of the acts constituting the violation.

(b) Any person may sue for injunctive relief to compel compliance with this subpart.

(c) The provisions of this section shall not be construed to prohibit prosecution under any appropriate provision of the Hawaii Penal Code . . .

Haw. Rev. Stat. § 11-228 (1988 & Supp. 1992)

FACTUAL SUMMARY

Plaintiff, Ian Lind is author and publisher of the "Hawai'i [sic] Monitor," an independent non-partisan newsletter that focuses on election campaign issues. On March 18, 1992, Plaintiff filed a complaint with the Campaign Spending Commission against the University of Hawaii Professional Assembly ("UHPA"). Plaintiff alleged that UHPA had violated certain Hawaii statutes by failing to fully disclose its contributions to political candidates and by making excessive, prohibited campaign contributions to Governor John Waihee's re-election campaign.

Plaintiff reported in the June 1992 issue of the "Hawai'i Monitor" the fact that a complaint against UHPA had been filed with the Campaign Spending Commission. The article was reprinted, with Plaintiff's permission, in a University of Hawaii student newspaper.

Subsequently, UHPA sought clarification from the Campaign Spending Commission as to the applicability of HRS § 11-216(d) to the proceedings initiated by Plaintiff's complaint. The Campaign Spending Commission decided to treat this requested clarification as a complaint against Plaintiff for violation of HRS § 11-216(d).

Upon learning of the pending charge for violation of HRS § 11-216(d), Plaintiff filed this lawsuit for equitable and injunctive relief declaring HRS § 11-216(d) unconstitutional under the Free Speech and Free Press provisions of the First Amendment to the United States Constitution, made applicable to the States through the Due Process Clause of the Fourteenth Amendment.

On July 17, 1992, the parties submitted to this Court a Stipulation of Dismissal with Prejudice of all Claims whereby the parties agreed that HRS § 11-216(d) was unconstitutional.

By order dated September 25, 1991, this Court rejected the parties' July 17, 1992, stipulation, stating its reluctance to overturn an enactment of the Hawaii Legislature without careful consideration and solid caselaw in support of its decision.

By stipulation filed with this Court on February 23, 1993, the parties have vacated their prior stipulations. The Department of the Attorney General is now "determined to defend § 11-216(d) as applied in this instance to 'charging parties' in Campaign Spending Commission proceedings, who knowingly partake of the burdens of the confidentiality provisions when they invoke the Commission's processes, and in light of the important interests in confidentiality as furthering the important First Amendment value of free speech and association." Def. Cross-Motion For Judgment On The Pleadings, Or, In The Alternative, For Summary Judgment at 2.

DEFENDANTS' POSITION

Defendants set forth the following arguments in support of upholding as constitutional HRS § 11-216(d):

1. This case does not involve the rights of third-party non-participants to confidential state proceedings, as were at issue in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535 (1978). The case only

deals with "charging" parties who bring a complaint under HRS § 11-216(d).

2. HRS § 11-216(d) does not (1) prohibit Mr. Lind from complaining generally (and publishing) his opinion that UHPA had violated the campaign spending laws; (2) prohibit Mr. Lind from filing a complaint with the Commission, and also complaining generally (and publishing) his opinion that UHPA had violated the campaign spending laws. HRS § 11-216(d) only requires Mr. Lind to maintain the confidentiality of the fact of his formal complaint and those facts of the investigation or hearing.

3. HRS § 11-216(d) can be read to apply only to Commission staff. Since § 11-216(d) only makes the "proceedings," or "the entire record of the proceedings" subject to confidentiality and since the sanctions imposed by § 11-228 and § 11-229 apply only to any "person violating any provision of this subpart," the statutory scheme, read as a whole, is susceptible to an interpretation that only persons with control over "the proceedings" or "the entire record" are subject to prosecution.

4. Assuming, *arguendo,* that HRS § 11-216(d) applies to information about the facts of "the proceeding" in the possession of the charging party, the law is constitutional in light of the reasoning of the Supreme Court of the United States in *Cohen v. Cowles Media Co.,* 111 S.Ct. 2513 (1991).

5. In any event, the reasons for confidentiality in the campaign spending context are compelling, and outweigh any First Amendment interest Mr. Lind might have in violating the confidentiality provision of the campaign spending laws because the targets of campaign spending complaints are private citizens, organizations, and candidates, in their personal capacities, exercising some of the most fundamental rights of free speech.

6. Even if Mr. Lind's statements about UHPA are protected, the regulation of speech is not justified on the basis of "the content of the speech" which Mr. Lind wishes to make about the sort of proceedings at issue here.

7. Where the Commission has departed from proper standards in assessing "probable cause," and thus in sealing campaign spending complaint proceedings, the remedies of common law mandamus lie as a charging party's source of relief. Even if no such remedies existed, Hawaii has a compelling interest in delegating final discretion to the Campaign Spending Commission over the issue whether further litigation would be "baseless."

8. Section 11-216(d), like a general noise ordinance, is "content neutral" and sufficiently tailored to validly promote Hawaii's interests. In any case, the Act " 'is narrowly drawn to achieve that end.' "

9. The statute is at the very least plainly constitutional insofar as it requires confidentiality pending the probable cause determination based on the reasoning in

Kamasinski v. Judicial Review Council, 797 F.Supp. 1083 (D. Conn. 1992).

10. To whatever extent this Court is not confident that the statute is constitutional, it should take the step of either construing the statute narrowly itself or stay the proceeding pending a certification of the issue to the Supreme Court of Hawaii under Appellate Rule 13.

PLAINTIFF'S POSITION

Plaintiff sets forth the following arguments in support of his position that HRS § 11-216(d) is unconstitutional:

1. There does not appear to be any overriding State purpose in the enactment of HRS § 11-216(d). Legislative history indicates only that the intent of the law was to provide for confidential hearings to insure that "due process shall be provided to anybody complained of."

2. Based on the United States Supreme Court's decision in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535 (1978), the Fourth Circuit's decision in *Baugh v. Judicial Inquiry and Review Commission*, 907 F.2d 440 (4th Cir. 1990), the Federal District Court of Rhode Island's decision in *Providence Journal Co. v. Newton*, 723 F.Supp. 846 (D.R.I. 1989), and this Court's prior order in *John Roe v. Akamine, et al.* (Civil No. 91-00252 DAE), HRS § 11-216(d) is unconstitutional.

In opposition to the Defendant's cross-motions and in reply to Defendant's opposition, Plaintiff further argues:

3. The statute by its very terms does not, as Defendants propose, confine its application to complaining participants or to employees of the Campaign Spending Commission.

4. The statute is unconstitutionally overbroad, *Board of Airport Com'rs of Los Angeles v. Jews for Jesus,* 482 U.S. 569, 107 S.Ct. 2568 (1987); *Forsyth County, Ga. v. Nationalist Movement,* 112 S.Ct. 2395 (1992), and cannot be narrowly construed. *Board of Airport Com'rs of Los Angeles,* 482 U.S. at 575-76, 107 S.Ct. at 2572-73.

5. Defendant's reliance on *Cohen v. Cowles Media Co.,* 111 S.Ct. 2513 (1991), is misplaced because, in this case, Plaintiff's only means of redress is that of complaining to the Campaign Spending Commission.

6. The subject matter of the instant statute is not "content-neutral" and the "exacting scrutiny" test must be applied to determine whether Section 11-216(d) meets constitutional muster. The statute does not meet the "exacting scrutiny" test. *Daily Herald Co. v. Munro,* 838 F.2d 380 (9th Cir. 1988).

DISCUSSION

As an initial note, this Court is well aware that a federal court should not reach a constitutional issue if it does not have to. *See, e.g., Ashwander v. TVA,* 297 U.S. 288, 341-56, 56 S.Ct. 466, 480-87 (1936). In this case, however,

the constitutional question is unavoidable. The constitutionality of HRS § 11-216(d) was squarely presented to this Court from the start. The alternatives to addressing the constitutionality of HRS § 11-216(d) are: (1) for this Court to, itself, narrowly construe HRS § 11-216(d); or (2) to certify HRS 11-216(d) to the state supreme court for a narrowing construction. For the reasons to be discussed below, this Court declines to narrowly construe HRS § 11-216(d) and finds that HRS § 11-216(d) does not meet the test for certification to the state supreme court.

A. Applicable Standards

1. Judgment on the Pleadings

Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. *Doleman v. Meiji Mutual Life Ins. Co.*, 727 F.2d 1480, 1482 (9th Cir. 1984).

In reviewing the defendant's motions under Fed. R.Civ. P. 12(c), the district court views the facts as presented in the pleadings in the light most favorable to the plaintiffs, accepting as true all the allegations in their complaint and treating as false those allegations in the answer that contradict the plaintiff's allegations. *Hoeft v. Tucson Unified School Dist.*, 967 F.2d 1298, 1301 (9th Cir. 1992); *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989).

When the district court goes beyond the pleadings to resolve an issue, the motion is properly treated as a

motion for summary judgment. Fed.R.Civ. P. 12(c); *Hal Roach Studios v. Richard Feiner and Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989); *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1301 (9th Cir. 1982).

2. Summary Judgment

Summary judgment shall be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). One of the principal purposes of the summary judgment procedure is to identify and dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2553 (1986). Summary judgment must be granted against a party who fails to demonstrate facts to establish an element essential to his case where that party will bear the burden of proof of that essential element at trial. *Id.* at 322, 106 S.Ct. at 2552.

> If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact, the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment.

T.W. Electrical Serv. v. Pacific Elec. Contractors Assoc., 809 F.2d 626, 630 (9th Cir. 1987) (citations omitted). Instead, Rule 56(e) requires that the nonmoving party set forth, by affidavit or as otherwise provided in Rule 56, " '*specific facts* showing that there is a genuine issue for trial.' " *Id.* (quoting Fed.R.Civ.P. 56 (e)) (emphasis in original). At

least some " 'significant probative evidence tending to support the complaint' " must be produced. *Id.* (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 1593 (1968)). Legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981, 99 S.Ct. 1790 (1979).

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. *See Eisenberg v. Ins. Co. of North America*, 815 F.2d 1285, 1289 (9th Cir. 1987) (citing, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986)). Thus, the question is whether "reasonable minds could differ as to the import of the evidence." *Id.*

The Ninth Circuit has established that "[n]o longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006, 108 S.Ct. 698 (1988). Moreover, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus, Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986) (footnote omitted). Indeed, "if the factual context makes the non-moving party's claim *implausible*, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Franciscan Ceramics*, 818 F.2d at 1468 (emphasis

in original) (citing, *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356.). Of course, all evidence and inferences to be drawn therefrom must be construed in the light most favorable to the nonmoving party. *T.W. Elec. Services*, 809 F.2d at 630-31.

B. First Amendment Framework

The United States Supreme Court analyzes regulations which abridge "protected speech"[2] by first determining whether the particular restrictive regulation is "content-based"[3] or "content-neutral."[4] *See generally*

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[2] The speech at issue in this case concerns public discussion of the existence and substance of a complaint regarding excessive and prohibited campaign contributions to the Governor's re-election campaign. It is beyond question that this is speech protected by the First Amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 720 (1964) ("debate on public issues should be uninhibited, robust, and wide-open"); *Carey v. Brown*, 447 U.S. 455, 467, 100 S.Ct. 2286, 2293 (1979) (expression on public issues rests "on the highest rung of the hierarchy of the First Amendment values").

[3] A "content-based" regulation restricts speech precisely because of the ideas or information that the speech contains or because of its general subject matter. Because such content discrimination so fundamentally contradicts the principles underlying the First Amendment, "content-based" regulations are subjected to the strictest scrutiny utilized by federal courts to analyze the legitimacy of governmental interference with speech. *See Police Dept. v. Mosely*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2290 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

[4] A "content-neutral" regulation involves an incidental interference with speech merely as a byproduct of the

Police Department v. Mosely, 408 U.S. 92, 92 S.Ct. 2286 (1972); *Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286 (1980); *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 103 S.Ct. 948 (1983); *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746 (1989). "Content-based" restrictions of protected speech are subject to strict scrutiny and require a governmental showing that the regulation in question is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end, utilizing the least restrictive means possible. *See, e.g., Carey*, 447 U.S. at 461, 100 S.Ct. at 2290.

"Content-neutral" restrictions of protected speech are subjected to a lesser level of judicial scrutiny which varies with the characterization of the forum in which the state is attempting to restrict access. *Perry*, 460 U.S. at 45, 103 S.Ct. at 954-55. State restrictions of access to a "traditional public forum," which "by long tradition or by government fiat have long been devoted to assembly or debate," *Perry*, 460 U.S. at 45, 103 S.Ct. at 954-55, require a governmental showing that the regulation in question has been narrowly tailored to serve a significant state interest, but need not demonstrate that it is the least restrictive means of achieving the state's end. *Ward*, 491 U.S. 781, 797-801, 109 S.Ct. 2746, 2757-59 (1989). A "content-neutral" restriction of access to a traditional public forum satisfies the requirement of narrow tailoring so long as it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.*

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government's effort to regulate some evil unconnected with the content of the affected speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 797-801, 109 S.Ct. 2746, 2757-59 (1989).

C. Court Treatment of Confidentiality Provisions

First Amendment challenges to confidentiality provisions have arisen in at least three differing contexts: (1) state government ethics commission proceedings; (2) judicial inquiry commission proceedings; and (3) grand jury proceedings. While this case concerns complaints regarding campaign spending provisions, the governmental interests put forth in other settings as justification for the restrictions placed on free speech and freedom of press are helpful to the resolution of this case.

The Seminal Case – *Landmark Communications, Inc. v. Virginia*

In *Landmark Communications, Inc. v. Virginia,* 435 U.S. 831, 98 S.Ct. 1535 (1978), the United States Supreme Court addressed the constitutionality of a state statute protecting the confidentiality of complaints of misconduct by state judicial officers.[5] The *Landmark* Court held that state laws prohibiting third persons, who are strangers to the inquiry, including newspapers, from divulging information regarding proceedings before a state commission which is authorized to hear complaints of misconduct by

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[5] Virginia Code § 2.1-37.13 (1973) implemented the state's constitutional mandate of confidentiality. It provided in relevant part:
"All papers filed with and proceedings before the Commission, and under the two preceding sections . . . including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character." *Landmark,* 435 U.S. at 830-31 n.1.

state officials, violate the First Amendment. *Id.* While recognizing the many valid concerns that are addressed by such statutes[6], which were in effect in 47 jurisdictions, the Court applied the clear and present danger test[7] and held that the third parties' First Amendment rights to free speech and freedom of press outweigh the need for confidentiality.

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[6] The *Landmark* Court expressly recognized three possible state interests:

> First, confidentiality is thought to encourage the filing of complaints and the willing participation of relevant witnesses by providing protection against possible retaliation or recrimination. Second, at least until the time when the meritorious can be separated from the frivolous complaints, the confidentiality of the proceedings protects judges from the injury which might result from publication of unexamined and unwarranted complaints. And finally, it is argued, confidence in the judiciary as an institution is maintained by avoiding premature announcement of groundless claims of judicial misconduct or disability since it can be assumed that some frivolous complaints will be made against judicial officers who rarely can satisfy all contending litigants.

Landmark, 435 U.S. at 834-36, 98 S.Ct. at 1539-40 (1978).

[7] The clear and present danger test is a variant of the strict scrutiny test of content-based regulations of protected speech. Specifically, the *Landmark* court stated the test to mean: "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. . . . The danger must not be remote or even probable; it must immediately imperil." *Landmark*, 435 U.S. at 845, 98 S.Ct. at 1544 (citing *Bridges v. California*, 314 U.S. 252, 263, 62 S.Ct. 190, 194 (1941); *Craig v. Hernia*, 331 U.S. 367, 376, 67 S.Ct. 1249, 1255 (1947)).

However, the *Landmark* Court expressly excludes from its consideration statutes that seek to punish participants in the inquiry. *Landmark*, 435 U.S. at 837, 98 S.Ct. at 1540. The Court indicated the possibility that it would uphold a statute aimed only at those who actually participate in the inquiry. *Landmark*, 435 U.S. at 837 n.9, 98 S.Ct. at 1540 n.9.

1. State Government Ethics Commission Proceedings

In *Providence Journal Co. v. Newton*, 723 F.Supp. 846 (D. R.I. 1989), the federal district court of Rhode Island extended the reasoning of *Landmark* to a statute which required all individuals before the Rhode Island Ethics Commission, whether participants in the inquiry or not, to keep confidential the fact and content of any complaint filed unless and until a finding of probable cause by the Commission.[8] The *Newton* Court held the statute unconstitutional because it concluded that the state had failed to meet its burden under the compelling interest test.

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[8] The statute in question, R.I.Gen.Law Sec. 36-14-5(1), provided:

"No person shall knowingly and willfully make public any complaint or the content of any complaint filed under this chapter without the consent of the person against whom the complaint has been filed, unless and until an adjudicative panel of the commission renders a final decision on the complaint following (i) a probable cause finding by an investigating committee of the commission, pursuant to Section 36-14-12(d) (4) of this chapter and (ii) the conduct of an adjudicative hearing pursuant to Section 36-14-13 of this chapter.

Providence Journal Co. v. Newton, 723 F.Supp. 846, 849 (D.R.I. 1989).

Under the compelling interest test, the *Newton* Court utilized the strictest scrutiny in analyzing seven interests proffered by the state[9] against what the court considered to be "prototypical content-based regulations of protected speech." *Newton*, 723 F.Supp. at 854-59. Acknowledging that the requirement of confidentiality regarding Ethics Commission proceedings serves "legitimate interests of the State of Rhode Island," the *Newton* Court emphasized that the state's concerns are not "compelling enough to silence a citizen-critic of official conduct through the imposition of civil and criminal sanctions." *Id.* at 857.

In *Roe v. Akamine* (Civil No. 91-00252 DAE) (Sept. 26, 1991), this District Court, the Honorable David Ezra presiding, accepted the parties' stipulation to the unconstitutionality of HRS § 84-31(c), a statute dealing with

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[9] 1. to prevent a complainant with self serving motives from publicly discussing an unfounded complaint until the Commission has had an opportunity to rule thereon;
2. to minimize the injury to the reputation of a public official caused by adverse publicity from unfounded complaints;
3. to maintain the public's confidence in its elected officials by preventing the premature disclosure of unfounded complaints;
4. to protect the complainants and witnesses from possible recrimination;
5. to facilitate the investigation of the complaint;
6. to prevent the use of a state agency to injure the reputation of another person; and
7. to prevent a complainant from enhancing the veracity and credibility of his complaint by invoking the name of the ethics commission.

Newton, 723 F.Supp. at 856.

confidentiality of complaints filed with the State of Hawaii Ethics Commission.[10] Section 84-13(c) is aimed at individuals, such as Plaintiff, who file the complaint, as well as third parties. The Order Approving Stipulation of Settlement is silent on the issue of whether the Plaintiff there was the individual who filed the complaint, or whether that fact had any bearing on the constitutionality of the provision.

2. Judicial Inquiry Commission Proceedings

In *Baugh v. Judicial Inquiry and Review Commission*, 907 F.2d 440 (4th Cir. 1990), the Fourth Circuit extended the reasoning of *Landmark* to statutes that seek to punish a person who files a complaint with the Judicial Inquiry and Review Commission for disclosing the fact that a complaint has been filed and for disclosing the action or non-action taken by the Commission.[11]

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[10] HRS § 84-31 provided in relevant part:
Any . . . individual, including the individual making the charge, who divulges information concerning the charge prior to the issuance of the complaint by the commission or if the investigation discloses that the complaint should not be issued by the commission, at any time divulges the contents of the original charge . . . shall be guilty of a felony punishable by a fine of not more than $5,000.00 or imprisonment for not more than five years, or both. . . .
Roe v. Akamine (Civil No. 91-00252 DAE) (Order Approving Stipulation of Settlement) (Sept. 26, 1991).

[11] The statute at issue, Va. Code § 2.1-37.13, reads in relevant part as follows:
"All papers filed with and proceedings before the Commission, . . . including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof

While, the *Baugh* Court did not reach the ultimate issue of the statute's constitutionality,[12] it clearly found that such a statute is not "content-neutral." *Id.* at 445. Accordingly, *Baugh* holds that the appropriate test to be employed when scrutinizing such a statute is the compelling interest test. *Id.* at 445.

However, it should be noted that the statute at issue in *Baugh* is somewhat different than the Hawaii statute here at issue. The statute in *Baugh* prohibits participants in the inquiry from disclosing the fact that a complaint has been filed as well as what action the commission took on the complaint. *Id.* at 443. Once the record of the proceeding is filed with the state Supreme Court (for further action), it loses its confidentiality. *Id.* at 442. The Hawaii statute prohibits participants as well as non-participants, except the party complained of, from disclosing that a complaint has been filed, but only until the commission has made a determination of probable cause. HRS § 11-216(d), *see supra* p.1. n.1. If the commission

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made by a reporter, shall be confidential and shall not be divulged, other than to the Commission, by any person who either files a complaint with the Commission, or receives such complaint in an official capacity, or investigates such complaint, is interviewed concerning such complaint by a member, employee or agent of the Commission, or participates in any proceeding of the Commission, or the official recording or transcription thereof, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character.

* * *

Divulging information in violation of this section is a misdemeanor." *Id.*

[12] The case is remanded to the district court for further analysis. *Baugh*, 907 F.2d at 445.

determines that probable cause does not exist, the entire record remains confidential at the option of the person complained of. *Id.*

In *Doe v. State of Florida Judicial Qualifications Commission,* 748 F.Supp. 1520 (S.D.Fla. 1990), a Florida district court considered the constitutionality of Article V, Section 12(d)[13] of the Florida Constitution which required confidentiality of all proceedings before the Judicial Qualifications Commission ("JQC") unless the Commission determined that probable cause existed *and* filed formal charges. *Doe,* 748 F.Supp. at 1522 (emphasis added). More specifically, the *Doe* Court considered the sole issue of "whether the First Amendment prohibits the JQC, insofar as it is charged with the responsibility of enforcing Article V, Section 12(d) of the Florida Constitution, from barring Plaintiff Doe from revealing the *fact* that he filed a complaint with the JQC." *Doe,* 748 F.Supp. at 1523 (emphasis in original).

Defendant Judicial Qualifications Commission offered eight state interests served by the confidentiality provision:

a. To prevent a complainant who might have self-serving motives from publicly discussing the fact of filing of a complaint that may

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[13] Article V, Section 12(d) of the Florida Constitution reads as follows:

[A]ll proceedings by or before the commission shall be confidential; provided, however, upon a finding of probable cause *and* the filing by the commission with said clerk of such formal charges against a justice or judge such charges and all further proceedings before the commission shall be public.

Doe, 748 F.Supp at 1522 (emphasis added).

prove to be unfounded until a preliminary investigation has been completed;

b. To minimize the risk of injury to the reputation of a judicial constitutional officer caused by any adverse publicity from unfounded complaints;

c. To maintain the public's confidence in its judicial officers by preventing the premature disclosure of the fact of filing of a complaint that may ultimately prove to be unfounded;

d. To protect the complaint and witnesses from possible pressure and recrimination;

e. To facilitate the investigation of the complaint;

f. To prevent the potential use of a constitutional agency to help injure the reputation of a judge;

g. To protect the constitutional right of privacy of a member of the Florida Bar who is also a constitutional officer – a judge;

h. To assure that the public policy behind the subject constitutional provision as adopted by the citizens of the State of Florida is protected consistent with the will of the people.

Doe, 748 F.Supp. at 1522-23.

Finding Article V, Section 12(d) to be a "content-based" restriction of protected speech, the *Doe* court applied with strict scrutiny the compelling interest test to JQC's stated justifications. *Id.* at 1524-25. While acknowledging that Florida surely has valid interests in maintaining the reputation of its judges and the integrity of its

judiciary, the *Doe* Court considered this interest "plainly insufficient under controlling precedent to sustain this restriction on free speech." *Id.* at 1526. Similarly, the *Doe* Court found the possibility that a complainant might wrongfully use the fact of filing with JQC as a means to amplify and legitimate the claim unpersuasive and overstated in the degree to which publication of the fact of filing of the complaint would lead people to believe the complaint to be true. *Id.* at 1527. Further, the *Doe* Court found insufficient the state's proffered interests in facilitation of investigations, and in the protection of privacy interest of the accused judges. Holding the restriction unconstitutional, the *Doe* court stated that the government had "failed to set forth any compelling interests alone or in concert sufficiently to justify the application of § 12(d) to prohibit the truthful publication of the simple fact that a complaint has been filed by Plaintiff John Doe with the JQC." *Id.* at 1529.

In direct conflict with *Doe* and *Newton* is a decision of the district court of Connecticut which, upon similar analysis, held constitutional a statute[14] making confidential certain proceedings before the state Judicial Review

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[14] The Statute at issue, Conn.Gen.Stat. § 51-511(a), provided that:

> "[a]ny investigation to determine whether or not there is probable cause that conduct under section 51-51i has occurred shall be confidential and any individual called by the commission for the purpose of providing information shall not disclose his knowledge of such investigation to a third party. . . . "

Kamasinski, 797 F.Supp. at 1087.

Council ("JRC"). *Kamasinski v. Judicial Review Council, et al.*, 797 F.Supp. 1083 (D.Conn. 1992).

The Connecticut district court held that although, under the First Amendment, Connecticut may not prohibit witnesses or complaints from disclosing information contained in testimony or complaints to the Judicial Review Council, the state may, prior to a determination by the Council that there is probable cause, forbid disclosure of any information an individual obtains by virtue of his personal interaction with the Council inquiry. *Kamasinski*, 797 F.Supp. at 1097. Likewise, the state may also forbid, prior to a probable cause determination, disclosure of the fact of filing a complaint with the Council investigation. *Id.*

Like *Doe*, the *Kamasinski* Court applied the compelling interest test to what it agreed was a "content-based" restriction of protected speech. *Id.* at 1090. Unlike *Doe*, the *Kamasinski* Court found that there were sufficiently compelling government interests to justify the limitation on speech, which was narrowly drawn to achieve those ends. *Id.* at 1094.

The *Kamasinski* Court considered there to be " 'a very good analogy' between the proceedings of the JRC at the stage before probable cause is found and the proceedings of a grand jury." *Id.* at 1090. Drawing heavily on the grand jury analogy, the *Kamasinski* Court set forth the following interests in support of upholding the statute as constitutional:

1. "Given the confidentiality of the preliminary investigation, the JRC may dispose of meritless complaints – for example, complaints

that on their face are utterly without basis or generated by apparent malice or bad faith – without lending any credibility to such complaints by appearing to conduct an extensive investigation." *Id.* at 1092

2. "Without confidentiality at the preliminary stage of judicial conduct review, Connecticut might have difficulty attracting and retaining high quality personnel for its judiciary if judges were to face continual abuse and harassment in JRC proceedings as a consequence of discharging their constitutional duties." *Id.*

3. "[I]f exposed to complaints in open, preliminary proceedings, Connecticut judges might tend to be intimidated or unduly influenced by belligerent litigants who would be more likely than others to commence a retaliatory campaign of harassment of the judge before the JRC. . . . The importance of judicial independence cannot be overemphasized . . . " *Id.*

4. "[C]onfidentiality encourages complaints, assistance in investigating complaints, and complete and truthful testimony." *Id.* at 1093.

5. "By making preliminary investigations confidential, the JRC may also informally encourage infirm or incompetent judges to retire before the need for a hearing." *Id.*

In ruling that the Connecticut statute is constitutional as it applies to prohibiting disclosure of the fact that a complaint had been filed with JRC, the *Kamasinski* Court distinguished the Fourth Circuit's decision in *Baugh*, 907

F.2d 444, and the Florida and Rhode Island district court decisions in *Doe*, 748 F.Supp. 1520, and *Newton*, 723 F.Supp. 846.

Kamasinski discounted *Newton's* statement that there is "no principled way to distinguish the substance of an ethics complaint from the facts underlying it or to distinguish speech about such a complaint from general public criticism of the accused official." *Newton*, 723 F.Supp. at 852. Rather, the *Kamasinski* Court found persuasive Justice Scalia's reasoning in *Butterworth v. Smith*, 494 U.S. 624, 110 S.Ct. 1376 (1990) (a First Amendment challenge to confidentiality provisions in the grant jury context), wherein he stated: "like the fact that one has testified to a grant jury, the fact of the filing of a complaint, and the complaints actual testimony to the JRC, are 'in a way information of the *state's* own creation.' " *Kamasinski*, 797 F.Supp. at 1095 (quoting *Butterworth*, 494 U.S. at 636-37, 110 S.Ct. at 1383) (emphasis in original).

Kamasinski distinguished the Fourth Circuit's decision in *Baugh* as one which, although "correctly stating the standard of review as one of compelling state interests, . . . fail[ed] to capture the panapoly of the state interests at issue." the *Kamasinski* court likewise distinguished the Florida district court's decision in *Doe* as one where the "discussion of the relevant state interests . . . appear[ed] . . . inadequate." 797 F.Supp. at 1095.

3. Grand Jury Proceedings

In *Butterworth v. Smith*, 494 U.S. 624, 110 S.Ct. 1376 (1990), the United States Supreme Court considered the

constitutionality of a Florida statute[15] that prohibited grand jury witnesses from disclosing their knowledge of proceedings before the grand jury, including the contents and substance of their own testimony. The Court held that the statute violated the First Amendment insofar as it prohibited witnesses from disclosing the contents of their testimony to the grand jury *after* the grand jury had expired. *Butterworth,* 494 U.S. at 633-35, 110 S.Ct. at 1382-83 (emphasis added).

Recognizing that the speech the Florida statute sought to restrict lay at the core of the First Amendment, the Supreme Court apparently applied a compelling

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[15] The relevant statute, Fla.Stat. § 905.27, provided in pertinent part that:

(1) A grand juror . . . or any other person appearing before the grand jury shall not disclose the testimony of a witness examined before the grand jury . . . except when required by a court for the purpose of:

(a) Ascertaining whether it is consistent with the testimony given by the witness before the court;

(b) Determining whether the witness is guilty of perjury; or

(c) Furthering justice.

(2) It is unlawful for any person knowingly to publish, broadcast, disclose, divulge, or communicate to any other person, or knowingly to cause or permit to be published, broadcast, disclosed, divulged, or communicated to any other person, in any manner whatsoever, any testimony of a witness examined before the grand jury, or the content, gist, or import thereof, except when such testimony is or has been disclosed in a court proceeding.

Butterworth v. Smith, 494 U.S. at 627, 110 S.Ct. at 1378.

interest test to the proffered state interests.[16] Agreeing that grand jury secrecy remains important to safeguard the state's proffered interests, the *Butterworth* Court did not agree that "those interests warrant a permanent ban on the disclosure by a witness of his own testimony once a grand jury has been discharged." *Butterworth*, 494 U.S. at 631-32, 110 S.Ct. at 1381. Striking down the statute, the Court stated:

> When an investigation ends, there is no longer the need to keep information from the targeted individual. . . . There is also no longer a need to prevent the importuning of grand jurors since their deliberations will be over. Similarly, the concern that some witnesses will be deterred from presenting testimony due to fear of retribution is, we think, not advanced by this prohibition . . .
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[16] The *Butterworth* Court acknowledged three primary reasons in support of retaining grand jury secrecy in general:

> First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of the testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There would also be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceeding, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Butterworth, 494 U.S. at 630, 110 S.Ct. at 1380.

> Florida undoubtedly retains a substantial interest in seeing that "persons who are accused but exonerated by the grand jury will not be held up to public ridicule. . . . " *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 219, 99 S.Ct. 1667, 1673 (1979). . . . But even in those situations where the disclosure by the witness of his own testimony could have the effect of revealing the names of persons who had been targeted by the grand jury but exonerated, our decisions establish that *absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech.*

Butterworth, 494 U.S. at 634-35, 110 S.Ct. at 1382 (citing *Landmark*, 435 U.S. at 841-42, 98 S.Ct. at 1542-43 (emphasis added).

Defendants' Authority – *Cohen v. Cowles Media Company*

The Defendant claims that the reasoning of *Cohen v. Cowles Media Company*, 111 S.Ct. 2513 (1991), controls this case.

In *Cowles*, the United States Supreme Court addressed the issue of whether the First Amendment prohibits a plaintiff from recovering damages, under state promissory estoppel law, for a newspaper's breach of a promise of confidentiality given to the plaintiff in exchange for information. Apparently analyzing the state promissory estoppel laws as "content-neutral" restrictions on protected speech, not requiring strict scrutiny, the Court held that a promissory estoppel action is not barred by the First Amendment. *Id.* at 2518.

Defendants claim that "like the newspaper that induced the source to turn over sensitive and newsworthy information, Mr. Lind can be deemed to have consented to the 'rules of the game' concerning his complaint." Defendants' Cross Motion at p.7. Defendants assert that Plaintiff "cannot have his cake and eat it too: he cannot invoke the State's process except on the terms which the State has reasonably dictated concerning confidentiality." *Id.*

Cowles is inapplicable to this case for two reasons. One, Plaintiff in no way has entered into a contractual relation with the Campaign Spending Commission as was the case in *Cowles.* Defendant's argument that Plaintiff had "consented to the rules of the game," states the proposition that if Plaintiff wishes to formally complain, he must follow the rule as dictated, regardless of the rule's constitutionality. Two, the *Cowles* Court did not apply the compelling interest test, as the *Baugh* Court makes clear should be applied to this case.

D. Certification To The State Supreme Court

Defendants argue alternatively that this Court should certify the scope of HRS § 11-216(d) to the state Supreme Court for a limiting instruction.

The Ninth Circuit addressed the appropriateness of certification in *Burdick v. Takushi,* 846 F.2d 587 (9th Cir. 1988), where it outlined a three-part test that federal courts should follow in determining whether to abstain from ruling on an ambiguous state statute:

> The Supreme Court has made it clear that "federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal question can be decided." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 236, 104 S.Ct. 2321, 2327 (1984) (citing *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643 (1941)). Our circuit has adopted a three-part test to determine whether *Pullman* abstention is warranted. First, the proper resolution of the state law question at issue must be uncertain. Second, a definitive ruling on the state issue must potentially obviate the need for constitutional adjudication by the federal court. Third, the complaint must touch upon "a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." *Bank of America Nat'l Trust and Savings Assoc. v. Summerland Cty. Water Dist.*, 767 F.2d 544, 546 (9th Cir. 1985) (quoting *Canton v. Spokane School Dist. No. 81*, 498 F.2d 840, 845 (9th Cir. 1974)).

Burdick v. Takushi, 846 F.2d at 588.

Justice O'Connor's concurring opinion in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 1794 (1985), sheds further light on the issue of certification:

> Although federal courts generally have a duty to adjudicate federal questions properly before them, this Court has long recognized that concerns for comity and federalism may require federal courts to abstain from deciding federal constitutional issues that are entwined with the interpretation of state law. . . . [W]here uncertain questions of state law must be resolved

before a federal constitutional question can be decided, federal courts should abstain until a state court has addressed the state questions. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501, 61 S.Ct. 643, 645 (1984). *See also Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236-37, 104 S.Ct. 2321, 2327-28 (1984).

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Where a state statute has never been construed or applied, it seems rather obvious that interpretation of the statute by a state court could substantially alter the resolution of any claim that the statute is facially invalid under the Federal Constitution.

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Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when, as is the case here, the state courts stand willing to address questions of state law on certification from a federal court." *Cf. Belloti v. Baird*, 428 U.S. 132, 150-51, 96 S.Ct. 2857, 2867-68 (1976).

Brockett, 472 U.S. at 508-510, 105 S.Ct. at 2804.

E. Overbreadth

1. Procedural Objections

As an initial note, Defendants raise procedural objections to the appropriateness of this Court considering the

issue of overbreadth.[17] Defendants argue that the issue of overbreadth is not properly before the Court because Plaintiff did not raise the issue in his motion for summary judgment, but raised the issue only in opposition and in reply to Defendants' cross motion.[18] *See* Def. Reply Memorandum, filed March 12, 1993. Defendants argue that Local Rule 220-4, which forbids a litigant from raising a new argument "for the first time in the reply," requires this Court to disregard the issue of overbreadth, or, alternatively only consider the issue of overbreadth in opposition to Defendants' motions, not in support of Plaintiff's motion.

This case is one with an unusual procedural history from the start. The parties to this action initially agreed to the unconstitutionality of HRS § 11-216(d) and submitted to this Court a stipulation thereon. This Court denied the

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[17] This Court is well aware of the United States Supreme Court's "usual . . . practice . . . [not] to proceed to an overbreadth issue . . . before it is determined that the statute would be valid as applied." *Board of Trustees, State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484-85, 109 S.Ct. 3028, 3037-38 (1989). In this case, the Court has followed that practice and considers the issue of overbreadth only in addition to the compelling interest analysis that is first considered.

[18] Defendants further argue that since Plaintiff's opposition and reply memorandum was filed late, this Court should disregard the opposition and reply in its totality as untimely. *See* Def. Reply Memorandum, filed March 12, 1993. It is within the Court's discretion to fashion an appropriate remedy for late-filed memoranda. Local Rule 100-3. The Court's remedy need not entail disregarding arguments raised in late-filed memoranda. *Id.*

parties' stipulation because it felt that additional examination of the purposes advanced by the Hawaii State Legislature in passing § 11-216(d) was required before the court could proceed with a "compelling interest analysis." *See* Order Rejecting Stipulation of Dismissal. Defendants thereafter decided to defend the constitutionality of HRS § 11-216(d) as applied to "charging parties." From the start, however, this Court has been considering a facial challenge to HRS § 11-216(d), not simply an as-applied challenge. The parties' prior stipulation sought, and Plaintiff's current motion for summary judgment seeks both a declaratory ruling that HRS § 11-216(d) is unconstitutional and a permanent injunction enjoining the enforcement of HRS § 11-216(d).[19] *See Bullfrog Films, Inc. v. Wick*, 646 F.Supp. 492, 507 (1986), *aff'd*, 847 F.2d 502 (9th Cir. 1988) ("A facial challenge means that the regulation could never be applied in a valid manner . . . both species of challenge – facial and as applied – are questions of law which may be freely addressed.") (citing *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796-98, 104 S.Ct. 2118, 2124-25 (1984)).

Overbreadth falls within the ambit of issues a court can properly address when considering such facial challenges:

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[19] It is Defendants who are determined to defend HRS 11-216(d) "as applied to charging parties," not Plaintiff. *See* Def. Cross-Motions at 2, filed February 25, 1993. Plaintiff's challenge to the statute has always sought its permanent invalidation, not simply a ruling that as applied to him it is unconstitutional. *See* Pl. complaint at 6-7, filed July 2, 1992; Pl. Motion for Summary Judgment, filed February 1, 1993.

> "[O]verbreadth is not used only to describe the doctrine that allows a litigant whose own conduct is unprotected to assert the rights of third parties to challenge a statute, even though "as applied" to him the statute would be constitutional. "Overbreadth" has also been used to describe a challenge to a statute that in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest. . . .
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>
> Whether that challenge should be called "overbreadth" or simply a "facial" challenge, the point is that there is no reason to limit challenges to case-by-case "as applied" challenges when the statute on its face and therefore in all its applications falls short of constitutional demands.

Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 965-66 n.13, 104 S.Ct. 2839, 2851-52 n.13 (1984).

Even if no party were to have raised the issue of overbreadth, there is authority for the proposition that a court may *sua sponte* raise issues concerning the facial validity of particular provision. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 106 S.Ct. 2548, 2554 (1986) ("[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence.") (citing 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2720, pp. 28-29 (1983)). *See also Bullfrog Films*, 646 F.Supp. at 507, *aff'd*, 847 F.2d 502 (9th Cir. 1988)

(district court *sua sponte* declared unconstitutional a regulation because it was "apparent to the Court that [the] regulation is facially inconsistent with the First Amendment because it is vague[20] and requires a non-neutral content examination"). *C.f. Taxpayers for Vincent,* 466 U.S. 789, 796-99, 104 S.Ct. 2118, 2124-25 (1984) ("This 'overbreadth' doctrine has its source in *Thornhill v. Alabama,* 310 U.S. 88, 60 S.Ct. 736 (1940). . . . The Court has repeatedly held that such a statute may be challenged on its face even though a more narrowly drawn statute would be valid as applied to the party in the case before it. This exception from the general rule is predicated on *a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.*") (emphasis added).

Since, in this case, both Plaintiff and Defendants[21] have addressed the issue of overbreadth, and since this Court has from the start, been considering invalidating HRS § 11-216(d) on its face, the Court finds it appropriate to address the issue of overbreadth both in opposition to Defendants cross motions and in support of Plaintiff's motion for summary judgment.

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[20] "Because vagueness closely parallels overbreadth in its deterrence of protected expression, the analysis of excessive vagueness in the first amendment area closely parallels that of overbreadth: The expression deterred by a vague statue must be both real and substantial." TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-32 at 1035 (2nd ed. 1988).

[21] Defendants address the issue of overbreadth in their March 12, 1993, reply memorandum.

2. Case Law

The overbreadth doctrine, as developed by the United States Supreme Court, holds that a law is void on its face if it "does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps with its ambit other activities that constitute an exercise" of protected expressive or associational rights. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-27 (1988) (citing *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736 (1940) (statute prohibiting picketing void on its face since it bans peaceful picketing protected by the first amendment)); *see also Board of Airport Com'rs of Los Angeles v. Jews for Jesus*, 482 U.S. 569, 107 S.Ct. 2568 (1987) (unanimously invalidating rule which proscribed *all* "First Amendment activities" in airport terminal). "A plausible challenge to a law as *void for overbreadth* can be made only when (1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory way of serving the law's constitutional from its unconstitutional applications so as to excise the latter clearly in a single step from the law's reach." TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-27.

In *Board of Airport Com'rs of Los Angeles v. Jews for Jesus*, 482 U.S. 569, 107 S.Ct. 2568 (1987), the Supreme Court, in striking down an airport regulation which banned all "First Amendment activities" stated:

> Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face "because it also threatens others not before the court – those

> who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared invalid." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503, 105 S.Ct. 2894 (1985). A statute may be invalidated on its face, however, only if the overbreadth is "substantial."

Board of Airport Com'rs of Los Angeles, 482 U.S. at 574, 107 S.Ct. at 2572; *see also Forsyth County, Ga v. Nationalist Movement*, 112 S.Ct. 2395, 2400-2401 (1992) ("It is well established that in the area of freedom of expression a overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable.")

3. The Requirement of Substantial Overbreadth

"The doctrine of 'substantial overbreadth' is a criterion the Court has invoked to avoid striking down a statute on its face simply because of the possibility that it might be applied in an unconstitutional manner." *Joseph H. Munson Co.*, 467 U.S. at 964, 104 S.Ct. at 2851. "It is appropriate in cases where, despite some possibility of impermissible application, the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct. . . . ' " *Id.* (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 580-81, 93 S.Ct. 2880, 2897-2898 (1973). "In such a case, the Court has required a litigant to demonstrate that the statute "as applied" to him is unconstitutional." *Id.*

"A statute drafted narrowly to reflect a close nexus between the means chosen by the legislature and the permissible ends of government is thus not vulnerable on its face simply because occasional applications that go beyond constitutional bounds can be imagined." TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-28 at 1025 (2nd ed. 1988).

4. Narrowly Construing a Facially Overbroad Statute

"[A] court can adopt an adequate saving construction only if the surviving portion of the statute clearly and unambiguously restricts conduct that is not privileged by the first amendment – and only such conduct. By pruning a statute of its overbroad sections, courts run the risk of leaving the remainder impermissibly vague." TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-29, at 1030 (2nd ed. 1988).

In *Board of Airport Com'rs of Los Angeles*, the United States Supreme Court, after determining that the statute was overbroad, considered whether the challenged regulations could be narrowly construed to withstand judicial invalidation, stating:

> The difficulties in adopting a limited construction of the resolution are not unlike those found in *Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316 (1964). At issue in *Baggett* was the constitutionality of several statutes requiring loyalty oaths. The *Baggett* court concluded that abstention would serve no purpose given the lack of any limiting construction, and held the statutes unconstitutional on their face under the First

> Amendment overbreadth doctrine . . . Here too, it is difficult to imagine that the resolution could be limited by anything less than a series of adjudications, and the chilling effect of the resolution on protected speech in the meantime would make such case-by-case adjudication intolerable.

Board of Airport Com'rs of Los Angeles, 482 U.S. 569 at 575-76, 107 S.Ct. at 2572-73.

THE CASE AT BAR

A. The Test To Be Applied

First, it is clear, based on the reasoning of *Landmark* and *Baugh,* that HRS 11-216(d) is a "content-based" restriction on protected speech. The provision, even in its limited use proposed by Defendant, concerns public discussion of the existence of a complaint filed with the Campaign Spending Commission. This is a regulation that "restricts speech precisely because of the information that the speech contains." *Police Department v. Mosley,* 408 U.S. 92, 92 S.Ct. 2286. It is not a "content-neutral" regulation that "involves an incidental interference with speech merely as a byproduct of the government's effort to regulate some evil unconnected with the content of the affected speech." *Ward v. Rock Against Racism,* 491 U.S. 781, 797-801, 109 S.Ct. 2746, 2757-59.

Accordingly, this regulation is subject to strict scrutiny and requires a governmental showing that the regulation in question is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end,

utilizing the least restrictive means possible. *Carey*, 447 U.S. 455.

B. Possible State Interests

While Defendants' Cross Motion does not fully set out potential compelling state interests,[22] the above-discussed case law yields the following possible interests to be served by keeping confidential proceedings before the Campaign Spending Commission:

1. Confidentiality is thought to encourage the filing of complaints and the willing participation of relevant witnesses by providing protection against possible retaliation or recrimination. *See Landmark*, 435 U.S. at 834-36, 98 S.Ct. at 1539-40; *Newton*, 723 F.Supp. at 856; *Doe*, 748 F.Supp. at 1522-23; *Kamasinski*, 797 F.Supp. at 1092-93; *Butterworth*, 110 S.Ct. at 1380.

2. At least until the time when the meritorious can be separated from the frivolous complaints, the confidentiality of the proceedings protects those complained of from the

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[22] Defendants' March 12, 1993, reply memorandum sets forth the following potential compelling state interest: "§ 11-216(d) is backed by compelling justifications in light of the First Amendment interests it *protects*, namely those of participants in the political process who have the substantive *right* to make contributions, in some contexts even anonymously, without the threat of protracted state proceedings which could "chill" First Amendment activity." Defendants' Reply Memorandum In Support Of Cross-Motion For Judgment On The Pleadings, Or, In The Alternative, Summary Judgment.

publication of unexamined and unwarranted complaints. *Id.*

3. To prevent a complainant from enhancing the veracity and credibility of his complaint by invoking the name of the Campaign Spending Commission. *Id.*

4. Confidence in the Legislature is maintained by avoiding premature announcement of groundless claims of campaign contribution violations since it can be assumed that some frivolous complaints will be made against Legislators who rarely can satisfy all contending constituents. *Id.*

5. Confidentiality is thought to promote the effectiveness of an investigation. *Id.*

While the Court recognizes the importance of these interests, it is not convinced that these interests are sufficiently compelling to justify the restriction imposed by HRS § 11-216(d) on protected First Amendment Speech. Nor is the Court convinced that HRS § 11-216(d) is narrowly drawn to achieve its ends, utilizing the least restrictive means possible.

1. Chilling First Amendment activity – campaign contributions

The Court finds overstated Defendants' claim that speech concerning the fact of the filing of a complaint, in violation of HRS § 11-216(d), will have a chilling effect on

third parties who wish to make campaign contributions.[23] Defendants themselves state that HRS § 11-216(d) could not restrict Plaintiff Lind from "complaining generally (and publishing) his opinion that UHPA had violated the campaign spending laws."Def. Cross-Motions at 5, filed February 25, 1993. Moreover, Defendants state, HRS § 11-216(d) in no way "prohibits Mr. Lind from filing a complaint with the Commission, and *also* complaining generally (and publishing) his opinion that UHPA had violated the campaign spending laws." *Id.* By Defendants own admission, the most HRS § 11-216(d) does is to restrict Plaintiff from stating or publishing the fact that a complaint has been filed with the Campaign Spending Commission until a probable cause determination is made by the Commission and, if no probable cause is found, to keep confidential the entire record of the proceedings at the option of the person complained of. Accordingly, its chilling effect occurs only when third-party contributors are dissuaded from making campaign contributions, not as a result of allegations of impropriety, but as a result of the statement, in addition to an allegation of impropriety, that a formal complaint has

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[23] Defendants' position, in effect, asks that this Court uphold HRS § 11-216(d)'s restriction on First Amendment protected speech in order to guard against the potential chilling effect that a removal of HRS § 11-216(d)'s restriction may have on another form of First Amendment protected speech – campaign contributions.

been filed.[24] Indeed, the greatest chilling of campaign contributions would likely occur as a result of the mere existence of a statute which imposes rules governing such contributions. The Court does not find Defendants' arguments compelling.

2. The Grand Jury Analogy

The above-listed possible state interests, with the exceptions of confidence in the Legislature and reputational interests, are most analogous to state interests set forth in the grand jury settling.[25] The main thrust of these interests is to promote the effectiveness of investigations.

In the context of campaign spending commission complaints, however, these interests lose much of their force. The grand jury process promotes effective investigations by maintaining confidentiality not only of the fact of the proceedings, but also by ensuring that the person

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[24] Even if some chilling effect on third-party contributions were to occur as a result of violations of HRS § 11-216(d), a "no probable cause" determination by the commission likely provides a better means for exculpating non-guilty parties than any other existing legal remedy.

[25] I.e., that (1) prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony; (2)witnesses would be less likely to testify fully and frankly before the Commission, as they would be open to retribution as well as inducements; (3) the risk that those about to be investigated would flee or try to improperly influence the Commissioner. *See Butterworth*, 494 U.S. at 630, 110 S.Ct. at 1380.

being investigated is unaware of an ongoing investigation. In the campaign spending commission context, however, HRS § 11-216(d) makes clear that the person complained of would be aware of an investigation[26] from the start. As a result, the grand jury concerns regarding undue influence, retribution, and inducement are simply inapplicable to the campaign spending commission context. In terms of expediting investigations, the Court is simply not convinced that speech about the existence of a campaign spending commission complaint will so hinder the process so as to be, in and of itself, a compelling state interest.

Likewise, the Court is unconvinced that the interests in maintaining confidence in the legislature, or the potential harm to reputational interests that may occur as a result of speaking to the fact that a complaint has been filed with the Campaign Spending Commission, rise to the level of compelling interests sufficient to justify HRS § 11-216(d)'s restriction on protected First Amendment speech.

Accordingly, for the above-stated reasons, this Court finds that there are no compelling state interests which would justify the restrictions on protected First Amendment free speech and free press that would result from application of HRS § 11-216(d).

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[26] HRS § 11-216(b) states: "The commission shall give notice of receipt of the complaint together with a copy of the complaint to the person cited and shall afford the person an opportunity to explain or otherwise respond to the complaint. The commission may also cause an investigation to be made of the complaint." *Id.*

C. Construing Hawaii Revised Statutes, Section 11-216(d)

When construing a statute, "the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589 (1992). *See also Norfolk & Western v. American Train Dispatchers*, 111 S.Ct. 1156, 1163 (1991).

HRS § 11-216(d), when read for its plain meaning, clearly applies to third parties and clearly applies even after a determination of no probable cause by the Commission. *See supra* p.1 n.1. Section 11-216(d) cannot, as Defendants assert, be plausibly read to require confidentiality from only the Commission staff. As written, Section 11-216(d) is plan and unambiguous.

1. HRS § 11-216(d) applies to 3rd Parties

Although HRS § 11-216(d) does not itself answer the question of who is subject to the statute's confidentiality requirement, HRS § 11-216(d), the section covering violations of the entire subpart (§§ 11-191 through 11-229), states that "[a]ny person violating any provision of this subpart . . . shall be guilty of a petty misdemeanor . . . or . . . a fine not exceeding $1,000." *Id.* When read for its plain meaning, the "any person" language of § 11-228 clearly would include commission staff, complainants, as well as third parties within the ambit of

§ 11-216(d)'s restriction. Defendants' claim that the statute can be read to apply only to the Commission staff requires an improper stretch in statutory construction.[27]

2. HRS § 11-216(d) applies AFTER a no probable cause determination

Section 11-216(d) likewise clearly requires that the fact of filing of the complaint be kept confidential even after a determination of no probable cause is made by the Commission. The statute requires that "all proceedings, *including the filing of the complaint,* investigation, and hearing" be kept confidential "[u]ntil a determination of probable cause is made by the commission." *Id.* (emphasis added). The statute further requires that "the entire record of the proceedings" be kept confidential after a determination of no probable cause is made. *Id.* When read for its plain meaning, it is clear that the language, "including the filing of the complaint," is to be included within the "entire record of the proceedings" which shall be kept confidential even after a determination of no probable cause is made. *Id.*

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[27] Indeed, this case may not have arisen at all if, as Defendants assert should be the case, HRS § 11-216(d) were read to require confidentiality only on the part of the Commission staff. It was the Campaign Spending Commission itself which decided to treat UHPA's request for clarification on HRS § 11-216(d)'s applicability to Plaintiff Lind as a complaint against Plaintiff for violation of HRS § 11-216(d). Plaintiff is a complainant and *not a Commission staff member.* Therefore, the Commission itself has applied HRS § 11-216(d) to more than merely the Commission staff.

The legislative history of HRS § 11-216(d), attached as an exhibit to Paintiff's [sic] Motion For Summary Judgment is unhelpful in this instance. At most, the legislative history appears to suggest some of the same state interests that exist in the grand jury setting, i.e, due process and facilitation of investigations.[28]

D. Overbreadth

Landmark makes clear that as applied to third-parties, HRS § 11-216(d) would be unconstitutional. Since HRS § 11-216(d), when read for its plain meaning, applies to third parties, it is unconstitutionally overbroad.

Likewise, none of the cited cases, including *Kamasinski*, stand for the proposition that the fact of the filing of a complaint can be kept confidential *after* a determination by the Commission. After a determination by the commission, the only possible remaining state interests served by requiring confidentiality of the fact of filing of the complaint are reputational. *See Butterworth*, 494 U.S. at 631-35, 110 S.Ct. at 1381-83. *Butterworth* makes clear that reputational interests alone are not compelling. *Id.* Since HRS § 11-216(d), by its terms, requires confidentiality, at the option of the person complained of, even

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[28] The House Standing Committee Report No. 176 noted the addition of a confidentiality requirement to what became HRS § 11-216(d), stating that "Witnesses and parties participating in Commission proceedings pursuant to this section maybe placed under the same constraints as jurors who are deliberating cases in court. Thus, the Commission may admonish participants to maintain the confidentiality of the proceedings." Act 327, 1975 Session Laws.

after a showing of no probable cause, it is, again, unconstitutionally overbroad.

1. Substantial Overbreadth

As discussed, " 'substantial overbreadth' is a criterion the United States Supreme Court has invoked to avoid striking down a statute on its face because of the possibility that it might be applied in a constitutional manner." *See supra Joseph H. Munson Co.*, 467 U.S. at 964, 104 S.Ct. at 2581. The criterion of substantial overbreadth does not apply where there is no easily identifiable, constitutionally proscribable conduct to which the statute can be applied.[29] Where there is "easily identifiable constitutionally proscribable conduct to which the statute can be applied," the criterion of substantial overbreadth requires a litigant "to demonstrate that the statute 'as applied' to him is unconstitutional." *See supra Joseph H. Munson Co.*, 474 U.S. at 964, 104 S.Ct. at 2851.

HRS § 11-216(d) includes within its coverage at least three unconstitutional applications. One, as applied to Plaintiff, HRS § 11-216(d) does not serve narrowly tailored, compelling state interests. Two, on its face, HRS § 11-216(d) unconstitutionally requires confidentiality on the part of third parties. Three, on its face, HRS § 11-216(d) unconstitutionally requires confidentiality

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[29] The criterion of "substantial overbreadth" is appropriately applied in cases where "despite some possibly impermissible application, the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct. . . . ' " *See supra Joseph H. Munson Co.*, 467U.S. at 964, 104 S.Ct. at 2851.

even after a determination of no probable cause is made by the Commission. HRS § 11-216(d) does not include within its coverage "easily identifiable, constitutionally proscribable conduct." For this reason, the doctrine of "substantial overbreadth" cannot be applied to avoid striking down HRS § 11-216(d).

Even if the Court was to find that HRS § 11-216(d) includes within its coverage "easily identifiable, constitutionally proscribable conduct," the criterion of "substantial overbreadth" only requires that Plaintiff demonstrate that as applied to him the statute is unconstitutional. *See supra Joseph H. Munson Co.*, 474 U.S. at 964, 104 S.Ct. at 2851. Because, in this case, the Court has already found that the statute does not serve narrowly tailored, compelling state interests, *see supra* text at p.40, Plaintiff has "demonstrate[d] that the statute 'as applied' to him is unconstitutional."[30] *See supra Joseph H. Munson Co.*, 474 U.S. at 964, 104 S.Ct. at 2851. Thus, alternatively, even if the criterion of substantial overbreadth is applied to HRS § 11-216(d), since Plaintiff has demonstrated that as applied to him the statute in unconstitutional, HRS § 11-216(d) is "substantially overbroad."

HRS § 11-216(d) simply was not "drafted narrowly to reflect a close nexus between the means chosen by the legislature and the permissible ends of government." *See*

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[30] "[W]here the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack." *Joseph H. Munson Co.*, 474 U.S. at 968, 104 S.Ct. at 2853 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217, 95 S.Ct. 2268, 2277 (1975)).

TRIBE, *supra*, § 12-28 at 1025.[31] HRS § 11-216(d) is "substantiatly overbroad."

2. Narrowly Construing HRS § 11-216(d)

Unless there exists a satisfactory way of severing the law's constitutional from its unconstitutional applications so as to excise the latter clearly in a single step from the law's reach, the law must be declared unconstitutional.

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[31] Defendants bring a Fed. R. Civ. P. 56(f) motion in order to present statistical compilations to show that HRS § 11-216(d) is not "substantially overbroad." Def. reply memorandum, filed March 12, 1993. Defendants seek to "submit additional evidence to show in which cases the provisions of HRS § 11-216(d) actually had any impact, and, therefore which evidence would rebut any conceivable basis for invalidating the statute on a claim of unconstitutional 'overbreadth.' " *Id.*

As discussed above, the doctrine of "substantial overbreadth" does not apply to HRS § 11-216(d), which contains within its coverage no easily identifiable, constitutionally proscribable activities. Moreover, since the Court has already determined that, as applied to Plaintiff, HRS § 11-216(d) is unconstitutional, HRS § 11-216(d) has already been determined to be "substantially overbroad."

The Court fails to see how statistical compilations would aid in considering HRS § 11-216(d)'s *potential chilling effect* on the protected First Amendment free speech and free press rights of third parties. At most, the compilations could serve to show how HRS § 11-216(d) has been applied, which this Court has already determined to be in violation of the United States Constitution. The factual information that Defendants are required to show is not how HRS 11-216(d) has been applied, but "a solidity of evidence" that the danger HRS 11-216(d) allegedly guards against "immediately imperil[s]." *See Landmark*, 435 U.S. at 845, 98 S.Ct. at 1544. Defendants' Rule 56(f) motion is accordingly denied.

See TRIBE § 12-27; *Board of Airport Com'rs of Los Angeles*, 482 U.S. 569, 107 S.Ct. 2568.

HRS § 11-216(d) is unconstitutionally overbroad both in its application to third parties and its requirement of confidentiality after a determination of no probable cause by the Commission. In order to fashion a remedy to these two problems, more than a single, clear step would be required of this Court. Recognizing the problems inherent in re-writing a provision of the Hawaii State Legislature, even if this Court were to assume to find it within its grant of power to do so, this Court declines to do so. As the United States Supreme Court stated in *Board of Airport Com'rs of Los Angeles*, 482 U.S. at 575-76, 107 S.Ct. at 2573, "it is difficult to imagine that the resolution could be limited by anything less than a series of adjudications, and the chilling effect of the resolution on protected speech in the meantime would make such a case-by-case adjudication intolerable."

E. Certification To The State Supreme Court

While the arguments are strong for state certification where a limiting usage would save the statute and the three *Pullman* abstention tests are met, in this case the three tests are not met.

First, the proper resolution of the state law question is not uncertain. When read for its plain meaning, HRS § 11-216(d) applies to third parties, and applies even after a no probable cause determination by the Commission.

Second, a definitive ruling on the state issue would not obviate the need for constitutional adjudication. Since, in this case, even in Defendants' proposed application of the statute as applied to Plaintiff, the Court is not

convinced that HRS § 11-216(d) is backed by narrowly tailored, compelling state interests, a narrowing construction would be of no help.

Moreover, even assuming that constitutional applications to this statute can be imagined, a narrowing instruction, in this case, represents an unsatisfactory way of separating the law's constitutional from its unconstitutional applications. In fashioning a constitutional application for this provision, what would be required, at least, is a complete revision of the statute.

Third, although legislation regarding campaign spending provisions constitutes a sensitive area of social policy upon which federal courts ought not to enter, in this case, no alternative to its adjudication is open. *See Burdick*, 847 F.2d 587. Therefore, this Court declines to certify HRS § 11-216(d) to the Hawaii Supreme Court.

F. Injunctive Relief

The Ninth Circuit has held that to be entitled to injunctive relief, a plaintiff must show either "(1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in their favor." *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991); *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir. 1990).

The standard for injunctive relief has clearly been met in this case. Plaintiff has established both, success on the merits, and the possibility of irreparable injury stemming from HRS § 11-216(d)'s unconstitutional restriction

will grant Plaintiff's motion for permanent injunction of enforcement of HRS § 11-216(d).

CONCLUSION

HRS § 11-216(d) fails for several reasons. First, as applied to Plaintiff, the state has failed to establish compelling state interests which are narrowly tailored to serve those ends, utilizing the least restrictive means possible. Second, HRS § 11-216 [sic] is unconstitutionally overbroad because, on its face, it applies to third parties. Finally, HRS § 11-21 [sic] is unconstitutionally overbroad because, on its face, it applies even after a determination of no probable cause has been made by the Commission. The Court further finds that HRS § 11-216(d) is neither subject to a narrowing construction nor appropriate for state supreme court certification. Accordingly, Plaintiff's motion for summary judgment is granted. Defendants' cross-motions for judgment on the pleadings, or, alternatively for summary judgment are denied. The Court hereby declares HRS § 11-216(d) unconstitutional. Enforcement of this provision is permanently enjoined.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, April 20, 1993.

/s/ Alan C. Kay
Chief United States District Judge

LIND V. GRIMMER, et al.; CIV. NO. 92-00415; ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND FOR A PERMANENT INJUNCTION AND DENYING DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

APPENDIX "C"

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

IAN Y. LIND,
Plaintiff,

V.

GARY G. GRIMMER, et al.,
Defendants.

JUDGMENT IN A CIVIL CASE
CASE NUMBER:
92-00415ACK
(Filed
April 16, 1993)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury, The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that summary judgment is hereby entered in favor of plaintiff and against defendants.

APR 26 1993
Date

/s/ Walter A.Y.H. Chinn
Clerk

(By) Deputy Clerk

cc: all parties

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

IAN Y. LIND, Plaintiff, vs. GARY GRIMMER, LINDA K. ROSEHILL, JAMES C.F. WANG, ROBERT Y. WATADA, individually, and in their capacities as Commissioners of the Campaign Spending Commission, State of Hawaii, and JACK M.K. GONZALES, individually, and in his capacity as the Executive Director of the Campaign Spending Commission, State of Hawaii, Defendants.	)	CIV. NO. 92-00415ACK

(Filed Sept. 10, 1992)

ORDER REJECTING STIPULATION OF DISMISSAL

The parties to this action have submitted a Stipulation of Dismissal and Order to the Court for its approval. Additionally, the parties seek a determination by this Court that Section 11-216(d), Hawaii Revised Statutes, is in violation of the First Amendment to the United States

Constitution. Both parties are in agreement that the statute is unconstitutional.[1]

Section 11-216(d) reads:

> Until a determination of probable cause is made by the commission, all proceedings, including the filing of the complaint, investigation, and hearing shall be confidential unless the person complained of requests an open hearing. In the event the commission determines that probable cause does not exist, the complaint shall be dismissed and the entire record of the proceedings shall be kept confidential at the option of the person complained of.

Violations of section 11-216(d) are classified as petty misdemeanors, and carry a sentence of thirty days imprisonment and a fine of $1,000.

Plaintiff, Ian Lind, has written, edited and published the "Hawai'i Monitor," an independent non-partisan newsletter that focusses [sic] on election campaign issues.

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[1] The parties originally submitted a stipulation agreeing to the unconstitutionality of the statute. The Court returned that stipulation and solicited memoranda in support of their position that the statute is unconstitutional, explaining that the Court will not approve such a stipulation without first making an independent finding as to the constitutionality of the statute. The parties then submitted memoranda, accompanied by second stipulation, which did not include an agreement as to the unconstitutionality of the statute. The Court contacted the parties to find out why the pertinent language had been removed, and it was explained to the Court that the second stipulation was intended to be entered simultaneously with an order from the Court making an independent finding that the statute is unconstitutional.

On March 18, 1992, Plaintiff filed a complaint with the Campaign Spending Commission in which he charged that the University of Hawaii had violated certain Hawaii statutes by failing to fully disclose its campaign contributions to political candidates, and had made excessive and prohibited campaign contributions to the Governor's campaign.

Plaintiff reported in the June 1992 issue of the Hawai'i Monitor that a complaint against the University of Hawaii Professional Assembly had been filed. The article was reprinted, with Plaintiff's permission, in a University of Hawaii student newspaper.

Subsequently, the University of Hawaii Professional Assembly filed a document entitled "Respondent's Supplemental Argument in Support of Request for Declaratory Order, "seeking clarification from the Campaign Spending Commission as to the applicability of § 11-216(d), Hawaii Revised Statutes, to the proceedings initiated by Plaintiff's complaint. The Campaign Spending Commission decided to treat this document as a complaint against Plaintiff for violation of § 11-216(d).

Upon learning that a charge for violation of § 11-216(d) was pending against him, Plaintiff filed this lawsuit, complaining that § 11-216(d) violates his rights to free speech and freedom of the press, as provided by the First and Fourteenth Amendments to the United States Constitution.

DISCUSSION

In support of their position, the parties cite Supreme Court precedent holding that state laws prohibiting third persons, who are strangers to the inquiry, including newspapers, from divulging information regarding proceedings before a state commission which is authorized to hear complaints of misconduct by state officials, violate the First Amendment. *Landmark Communications, Inc. v. Virginia*, 98 S.Ct. 1535 (1978) (declaring unconstitutional a state statute protecting the confidentiality of complaints of misconduct by state judicial officers). While recognizing the many valid concerns that are addressed by such statutes, which were in effect in 47 jurisdictions, the Court applied the compelling interest test, which requires the state to demonstrate that the confidentiality provision is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end, and held that the third parties' First Amendment rights to free speech and freedom of the press outweigh the need for confidentiality. However, *Landmark* expressly excludes from its consideration statutes that seek to punish participants in the inquiry. *Id.* at 1540-41. The Court indicated a willingness to uphold a statute aimed at those who actually participate in the inquiry. *Id.* at n. 9.

The Fourth Circuit has extended the reasoning of *Landmark* to statutes that seek to punish the participants in the inquiry. *Baugh v. Judicial Inquiry and Review Commission*, 907 F.2d 440 (4th Cir. 1990). However, the *Baugh* decision merely declares that the statute is not content neutral, and thus the appropriate test to be employed when scrutinizing such a statute is the compelling interest test. *Id.* at 445. The court does not strike down the

statute. Instead, the case is remanded to the district court for further analysis. *Id.*

Moreover, the statute at issue in *Baugh* is somewhat different than the Hawaii statute here at issue. The statute in *Baugh* prohibits participants in the inquiry from disclosing the fact that a complaint has been filed as well as what action the commission took on the complaint. *Id.* at 443. Once the record of the proceeding is filed with the Supreme Court (for further action), it loses its confidentiality. *Id.* at 442. The Hawaii statute prohibits participants as well as non-participants, except the party complained of, from disclosing that a complaint has been filed, but only until the commission has made a determination of probable cause. § 11-216(d). If the commission determines that probable cause does not exist, the entire record remains confidential at the option of the person complained of. *Id.*

The district court of Rhode Island has also extended the reasoning of *Landmark* to statues aimed at participants in the inquiry. *Providence Journal Co. v. Newton*, 723 F. Supp. 846 (D.R.I. 1989). Striking down a Rhode Island statute in an order granting summary judgment, the district court analyzed each of the justifications for the statute advanced by the state, considered evidence presented to it, and concluded that the state had failed to meet its burden under the compelling interest test. *Id.* at 859. The statute at issue prohibited all individuals, whether or not participants in the inquiry, from disclosing any information pertaining to the proceedings until a final adjudication by the commission. *Id.* at 849.

Finally, the parties note that this Court has declared unconstitutional a similar Hawaii statute, which prohibited any individual from divulging information concerning a complaint that had been filed with the Hawaii Ethics Commission. *Roe v. Akamine, et al.*, Civ. No. 91-00252ACK (Sept. 26, 1991) (Judge David A. Ezra) (declaring § 84-31(c), Hawaii Revised Statutes, unconstitutional). Section 84-31(c) is aimed at individuals, such as Plaintiff, who filed the complaint, as well as at third parties. The Order Approving Stipulation of Settlement is silent, however, on the issue of whether the Plaintiff there was the individual who filed the complaint, and if so, whether that has any bearing on the statute's constitutionality.

The Court is reluctant to overturn an enactment of the Hawaii Legislature without careful consideration and solid caselaw in support of its decision. At this stage in the proceedings, the Court has not been presented with any evidence, nor has it had the opportunity to properly examine the purposes advanced by the Legislature in passing § 11-216(d). Before it may make a determination as to whether or not the statute at issue is constitutional, the Court must go through the same compelling interest analysis employed by the Supreme Court in *Landmark*, and the Rhode Island district court in *Newton*. Therefore, at this time, the Court will decline to adopt the stipulation proposed by the parties. The parties are free to stipulate to dismissal without the provision concerning the constitutionality of § 11-216(d).[2] Alternatively, the

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[2] The Court currently has such a stipulation before it, but understands that the parties did not intend for the stipulation to

parties may file a motion for summary judgment, and provide the Court with evidence, and more adequate caselaw in support of their position.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, SEP 10 1992 .

/s/ Alan C. Kay
Chief United States
District Judge

IAN LIND V. GARY GRIMMER, ET AL.; CIV. NO. 92-00415ACK; ORDER REJECTING STIPULATION OF DISMISSAL.

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be entered unless the Court made a finding that the statute is unconstitutional. *See supra*, n.1.

APPENDIX "E"

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IAN Y. LIND, Plaintiff-Appellee, v GARY GRIMMER, LINDA K. ROSEHILL, JAMES C.F. WANG, ROBERT Y. WATADA, individually, and in their capacities as Commissioners of the Campaign Spending Commission, State of Hawaii, and JACK M.K. GONZALES, individually, and in his capacity as the Executive Director of the Campaign Spending Commission, State of Hawaii, Defendants-Appellants.	)	CA No. 93-16021 DC No. CV-92-00415-ACK ORDER

(Filed Aug. 17, 1994)

BEFORE: SCHROEDER, D.W. NELSON AND CANBY, CIRCUIT JUDGES.

The panel has voted unanimously to deny the petition for rehearing.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX "F"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

IAN Y. LIND, Plaintiff, vs. GARY GRIMMER, LINDA K. ROSEHILL, JAMES C.F. WANG, ROBERT Y. WATADA, individually, and in their capacities as Commissioners of the Campaign Spending Commission, State of Hawaii, and JACK M.K. GONZALES, individually, and in his capacity as the Executive Director of the Campaign Spending Commission, State of Hawaii, Defendants.	Civil No. 92-00415-ACK DECLARATION OF JACK M.K. GONZALES Date: MARCH 15, 1993 Time: 9:00 A.M. Judge: ALAN C. KAY

DECLARATION OF JACK M.K. GONZALES

I, Jack M.K. Gonzales, pursuant to 28 U.S.C. § 1746, declare:

1. I am the Executive Director of the Campaign Spending Commission and have worked at the Commission since 1976. I am competent to speak to the issues addressed in this declaration and my statements herein are based on my personal knowledge.

2. In over ninety percent of the matters that are brought to the attention of the Commission, the matter is

addressed by "informal" process. By that, a staff officer will be assigned to contact the respondent party and determine if the matter can be resolved informally. If this occurs, the Commission will consider the matter not to have reached the "formal complaint" stage, and the requirements of confidentiality invoked by § 11-216(d), Haw. Rev. Stat., will not be enforced with respect to any communications in the case.

3. A frequent example of this occurs in the area of excessive contributions. If a campaign report indicates that an excessive contribution (one over the legal limits) has been made, the respondent campaign will be contacted and requested to remedy the excess by returning the impermissible portion of the contribution to the contributor. Usually this results in compliance, and no formal complaint need be pursued. As a result, facts about this process will not be deemed confidential.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Honolulu, Hawaii, March 12, 1993.

/s/ Jack M.K. Gonzales
JACK M.K. GONZALES